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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 171.

J. A. SIMPSON,
Petitioner,

vs.

THE KANSAS CITY CONNECTING RAILWAY COMPANY, a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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J. A. SIMPSON,
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THE KANSAS CITY CONNECTING RAILWAY COMPANY, a Corporation,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States.

The petitioner, J. A. Simpson, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Missouri, entered in the above-entitled cause on March 10, 1958.

OPINIONS.

The principal opinion of the Supreme Court of Missouri, *en banc*, Appendix A, *infra*, and the *Per Curiam* opinion on overruling Respondent's (this petitioner's) motion for rehearing or for clarification and modification Appendix B, *infra*, have been reported together in *Simpson* v. *Kansas City Connecting Railroad Company*, Mo. Sup., 312 S.W.2d 113.

JURISDICTION.

The opinion and judgment of the Supreme Court of Missouri, *en banc*, were entered on March 10, 1958; a motion for rehearing in that Court, or in the alternative for modification and clarification of the opinion were overruled on April 14, 1958.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3).

QUESTIONS PRESENTED.

The Kansas City Connecting Railroad admittedly is engaged in interstate commerce, transporting livestock and feed to and from other railroads to the stockyards in the Kansas City Terminal area; petitioner was a locomotive engineer in charge of defendant's steam locomotive at the time of the accident involved and the question is whether such locomotive was at the time of the accident in "use" or in "service" on defendant's "line" within the meaning of the Boiler Inspection Act, 45 U.S.C.A., Section 23, so as to make The Boiler Inspection Act applicable.

Except for its approximately eight-mile connecting line and switch tracks, this railroad operates over the tracks

of other railroads and has but a single locomotive, the one involved in this suit. It has no roundhouse or yard facilities for repairing the engine and so entered into a verbal agreement under which the Union Pacific Railroad repaired the engine from time to time with Union Pacific crews in its yards and roundhouse in Kansas City, Kansas. Steam had been leaking from around the injector and boiler check valve for some time and on December 23, 1950, petitioner and his crew took the steam engine to the Union Pacific yards for repairs. Petitioner spotted the engine on track number one at the customary place beside the oil house and went to the engine dispatcher's office where he signed a "locomotive inspection report" detailing nine items for repairs including repairs to "boiler check" and "overflow pipe on left injector" and left the engine to be repaired. A Christmas week end intervened and on Tuesday December 26, 1950, petitioner and his crew went to the Union Pacific engine dispatcher's office to obtain the engine. When they got to the train dispatcher's office petitioner saw the engine parked in the usual place and was told by the boss in that office that the engine was ready. Petitioner signed the register with his name, the engine number, the date and the time he was taking the engine out and walked over to the engine. The engine was spotted on the west side of the oil house on No. 1 track, "the outbound rail" headed south away from the roundhouse and in the direction petitioner would take the engine to begin its regular switching work. Petitioner inspected the engine from the ground then got on the engine and looked at the gauges and they appeared to be all right. Petitioner then started the engine forward and had proceeded two or three engine lengths when blinding steam came from the fireman's side and petitioner stopped the engine; he then backed the engine up and spotted it close to the engine dispatcher's office. After he got down from the engine he saw steam

escaping from either the injector or the boiler check valve. He climbed upon the front end of the engine toward the running board and before he reached the running board there was a big burst of steam came out and hit him in the face causing him to loosen his hold and fall off backwards six feet to the ground and suffer serious and permanent injuries. It was part of petitioner's duties to inspect what appeared to be something wrong with the engine and if he had not fallen and been injured he would have filled out another locomotive inspection report and left it with the Union Pacific engine inspector.

The trial Court directed a verdict for respondent (defendant) on the issues under the Boiler Inspection Act and denied petitioner's motion for a new trial on such issue but granted a new trial and ordered re-instatement of the pleadings as to issues under the Federal Employers' Liability Act and respondent appealed; in Division the Supreme Court of Missouri reversed the trial court in holding no submissible case was made under the Boiler Inspection Act and affirmed the trial court in granting a new trial as to the issues under the Federal Employers' Liability Act (The majority and dissenting opinions in division are set out in Appendix C); upon dissent of one judge only on the issue whether the engine was in "use" under BIA, the case was transferred to the Court, *en banc,* where the opinion herein complained of was rendered refusing to pass on the issues under the Boiler Inspection Act for the stated reasons that it was not necessary to the decision and because the Court was unanimously of the opinion that the trial court was right in directing a verdict for defendant on the issues under the Boiler Inspection Act, and had unanimously voted against adopting the divisional opinion on that issue (Appendix C, *infra*).

The divisional opinion in this case by two judges and three commissioners, held that the trial court erred in sustaining a demurrer to plaintiff's evidence under BIA. It was on the BIA "use" issue that the case was transferred to the state court *en banc* and there briefed and argued by the parties on the basis that that issue was before that court. Now, if this Court fails to rule on the pending question under BIA, plaintiff will be confronted with a second trial limited to the portion of his case under FELA. Without correction of the trial court's ruling regarding BIA, the trial court will adhere to that ruling and will permit submission to the jury only on FELA. In order to be permitted to obtain a jury verdict upon his whole case, under both Acts, plaintiff would be compelled to undergo a second appeal from a final judgment on all issues—both FELA and BIA—to undergo a third trial, and likely a third appeal. This, clearly, would not serve the ends of justice.

The question thus presented is whether petitioner was entitled to have the issue of whether the engine at the time of the accident was in "use" "on its line" passed upon by a jury so as to bring the case within the provisions of the Boiler Inspection Act.

STATUTES INVOLVED.

The pertinent provisions of the Boiler Inspection Act, 45 U.S.C.A., Section 23, are printed in Appendix D, *infra*.

STATEMENT OF FACTS.

(References designated "Tr." are to the typewritten transcript of the record on appeal filed in the Supreme Court of Missouri, one copy of which is filed herewith.)

The Federal question involved in the instant case is the interpretation of the Federal Boiler Inspection Act (45 U.S. Code, Sec. 23) which was first raised by the petitioner upon the filing of his petition in the Circuit Court of Jackson County, Missouri (Tr. 1-4), alleging that while he and the railroad were engaged in interstate commerce he suffered injuries as a result of defendant's violation of the Boiler Inspection Act and also as a result of defendant's negligence under the Federal Employers' Liability Act (Tr. 1-4). At the beginning of the trial petitioner dismissed the allegations of his petition under the Federal Employers' Liability Act and proceeded to trial only on violation of the Boiler Inspection Act (Tr. 8, 9). At the close of petitioner's evidence respondent moved for a directed verdict which the Court gave (Tr. 88-90). Petitioner then filed a motion for a new trial in whole or in part—for a new trial on the issues under both the Boiler Inspection Act and the Federal Employers' Liability Act or a new trial on the issues under the Federal Employers' Liability Act only and the Court on April 17, 1956, sustained the latter, denying a new trial under the Boiler Inspection Act but granting a new trial on the issues under the Federal Employers' Liability Act (Tr. 91-94, 110-111). Respondent then filed its notice of appeal on April 24, 1956, and appealed to the Supreme Court of Missouri where a Division of that Court handed down an opinion affirming the order granting a new trial under the Federal Employers' Liability Act and reversing the order denying a new trial under the Boiler Inspection Act and remanding the cause for trial under both acts; the case was then transferred from Division to the Court, *en banc*, which rendered the present opinion on March 10, 1958, Appendix A, affirming as to the new trial under the Federal Employers' Liability Act and refusing to rule directly on the issues under the Boiler Inspection Act on grounds it was unnecessary to the decision. Petitioner filed a Motion for

rehearing or in the alternative for modification or clarification which the Court on April 14, 1958, overruled and denied in a *per curiam* opinion (Appendix B), thereby refusing to review rights of petitioner under the Boiler Inspection Act. In so doing, the court ruled that the court was unanimously of the opinion that the divisional opinion was wrong and that the trial court ruled correctly in directing a verdict for defendant under the Boiler Inspection Act.

As the case now stands in the state court petitioner will have to go back to the trial court and try the case solely under the Federal Employers' Liability Act. It is doubtful under Missouri practice whether he can on any subsequent appeal obtain a review of his right to have the issues under the Boiler Inspection Act submitted to a jury, but even if he can it is obviously an inadequate and abortive remedy in that he will not be permitted on the new trial now ordered to offer any additional evidence on the issues under the Boiler Inspection Act and will have to appeal, if at all, on the same record the Supreme Court of Missouri has found to be insufficient to entitle him to go to the jury. In ruling that a similar question in a case arising in Missouri was subject to review in this court, this court in the case of *Urie* v. *Thompson*, 337 U.S. 163, 172, 69 S. Ct. 1018, the court said (l.c. 34):

> "Local rules of practice cannot bar this Court's independent consideration of all substantial federal questions actually determined in earlier stages of the litigation by the court whose final adjudication is brought here for review. (citing cases)."

The opinion of the Missouri Supreme Court herein deprives petitioner of the right to have the issues under the Boiler Inspection Act reviewed and his right to have them submitted to a jury determined, when said issues are in-

separably intertwined with the issues under FELA and a proper and complete determination of the appeal cannot be made without considering said issues.

In accordance with a verbal agreement between defendant railroad and the Union Pacific Railroad petitioner on December 23, 1950, took the engine to the Union Pacific yards for repairs because of an excessive leakage of steam (Tr. 14, 51, 52, 53, 15, 16, 37, 39, 48). A Christmas week end intervened and on Tuesday, December 26, 1950, plaintiff and his crew went for the engine (Tr. 16, 17, 39, 40, 43).

When plaintiff went back to the Union Pacific roundhouse for the engine, after having previously left it there for repairs, he found it parked at the usual and customary place for return after repairs (Tr. 17, 18, 19, 38, 45). He then went to the dispatcher's office (Tr. 17, 18, 19, 38, 45) where the roundhouse boss told plaintiff the engine was ready for service (Tr. 41). Plaintiff then signed the engine register giving the time he was taking the engine out (Tr. 17, 18, 41, 42). Plaintiff and his crew then took possession of the engine and put it in motion away from the repair shops toward the place it would haul freight (Tr. 17, 40, 42). When the engine began leaking steam even worse than before plaintiff backed the engine up to the place for delivery to the Union Pacific for repairs (Tr. 51, 19, 20, 44). In returning the engine for repairs it was necessary for plaintiff to inspect the engine to determine what repairs were needed, to file a written report with the Union Pacific specifying the repairs to be made (Tr. 24, 25, 46, 16) and then sign the engine register (Tr. 19, 18, 41, 42). Plaintiff climbed up on the engine to make an inspection to enable him to make a report specifying the repairs to be made when the burst of steam struck him in the face and caused him to fall and be injured (Tr. 24, 45, 46, 19, 23, 25,

26, 44, 55, 56, 57, 63, 64). Plaintiff was still in possession of the engine in process of making the inspection and had not yet filed a written report specifying the repairs to be made and turning the engine back to the Union Pacific when the accident occurred (Tr. 44, 46). The engine was not at a place where the repairs were to be made but would be moved by the Union Pacific Hostlers from that point to the roundhouse where the repairs were to be made (the repairs could not be made outside), and after repairs would return it to the re-delivery point (Tr. 5, 45). The engine in question at the time was on the Union Pacific tracks under an agreement between defendant and the Union Pacific Railroad (Tr. 80, 82).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

The Supreme Court of Missouri Erred in Holding That There Was Not Sufficient Evidence to Take to the Jury the Question of Whether the Engine in Question Was in Use on Respondent's Line Within the Meaning of the Boiler Inspection Act (45 U.S.C.A. 23) at the Time of the Accident Here Involved.

The engine in question at the time was on the Union Pacific tracks under an agreement between Appellant employer and the Union Pacific Railroad (Tr. 80-82). The Union Pacific track at said time and place under the circumstances was the Appellant's "line" within the meaning of the statute.

In the case of *Hood* v. *Baltimore & O. R. Co.*, 302 Mo. 609, 259 S.W. 471, the Court in ruling a similar situation under the Federal Safety Appliance Act, said (l.c. 475):

"It is contended by respondent that the evidence adduced at the trial was insufficient to show that plaintiff was injured on defendant's line as contemplated in the federal statutes heretofore mentioned.

The evidence clearly shows that the train in controversy, including the mail car with the unworkable coupler, belonged to defendant. The plaintiff was at the time of his injury, and prior thereto, a car inspector in the service of defendant. The latter was selling passenger tickets from St. Louis, Missouri, to points outside the state, and was likewise receiving and transporting freight and express business in the same manner. Aside from the actual movement of the train in controversy by the engine and train crew of the Terminal road, it was operated by its own conductor, porter and brakeman, as it would have been had the respondent owned the road from St. Louis, Missouri, to its western terminus at East St. Louis. In the absence of evidence on the subject, it should be assumed that the Terminal Company, in making up the defendant's interstate train, and transporting the same to East St. Louis over the Terminal Road, with the engines and crew of the latter, was acting under some running arrangement with the defendant, or under an express or implied agreement between said railway companies. It was necessary that defendant in carrying on its interstate business between St. Louis, Missouri, and points outside the state, should do so through the agency of some other carrier, as it had no line of its own from St. Louis, Missouri, to the western terminus of its road. As the defendant and Terminal Company were acting in concert in making up defendant's train aforesaid, we are of the opinion that the Terminal Company, in performing said service, was the agent of defendant at the time and place of accident, and that plaintiff brought his case within the purview of the federal statutes heretofore mentioned, by substantial testimony which entitled him to go to the jury. Section 2 of Safety Appliance Act of March 2, 1893 (27 Statutes at Large, 531, c. 196), and as amended by

Act of March 2, 1903 (32 Statutes at Large, 943); Gray v. L. & N. Railroad Co., (D.C.) 197 Fed. 874; Philadelphia & R. Ry. Co. v. U. S., 191 Fed. 1, 111 C.C.A. 661.

We are of the opinion that the principles of law announced in the two cases just cited apply with equal force to the facts in the present controversy.

After a very careful consideration of both the law and facts in this case, we have reached the conclusion that plaintiff produced substantial testimony at the trial of the case which entitled him to go to the jury on the merits of the controversy.

The judgment below is accordingly reversed, and the cause remanded, to be proceeded with in conformity to the views heretofore expressed."

We have checked the citator and find that case has never been overruled, modified or even questioned.

In *Philadelphia and Reading Railway Company* v. *United States*, 3rd Cir., 1911, 191 Fed. 1, the defendant operated a car with a defective grabiron on a track owned by another company and contended this operation was not "on its line." The train of which the car was a part was about to proceed toward defendant's tracks, and had actually started on its passage in the direction named. It was the custom for defendant's trains to pass over tracks of the other company in a continuous movement in the conduct of interstate traffic. The court affirmed the judgment in favor of the United States for penalties, and held (191 Fed. 4) that the car was in use on defendant's line, saying it (l.c. 4):

"* * * was in lawful use of these tracks for the conduct of its interstate traffic, under a contract with the corporation owning the same. * * * that the defendant company had a legal right to the use of these tracks, and that during such use they were properly

> the line of the defendant company within the meaning of the 'Safety Appliance Act.' * * * The fact, if it be a fact, that in this case the inspection of the cars was made by the servant of the New Jersey Central Road, cannot relieve the defendant from the liability imposed by the Act. It cannot by contract dispense with any care required of it by law, and the most that could be said of such a situation would be that it had voluntarily made the inspectors of the other company its own."

In *Gray v. L. & N. Railroad Company*, District Ct., Tennessee, 1912, 197 Fed. 874, 876, a switchman sued his employer under the Safety Appliance Acts for injuries suffered when a car with a defective coupler was used to deliver a shipment on a private switch track owned by an industry. In that case the court held that the term "its line" includes any track used by the defendant, and that the case of *Philadelphia and Reading Railway Company v. United States*, cited and quoted above, is "controlling" in actions by employees for damages against the employer under the Safety Appliance Acts.

In the instant case the answers by the respondent to the interrogatories show that it had a contract with the Union Pacific Railroad Company to repair the locomotive in question for a consideration (Tr. 81, 82). The evidence shows that in order for the locomotive so to be repaired, it was necessary for the locomotive to use the tracks where the injury occurred, and traverse tracks of the Union Pacific (Tr. 36, 37, 81, 82, 86, 87). Thus, the respondent had a right to use the track in question, to further its own business, and the track was the track or the line of the respondent within the meaning of the Safety Appliance Acts.

At the time of the injury the plaintiff had commenced operating the locomotive toward the defendant's own

tracks, and, in fact, was on the way to the performance of interstate switching activities for the defendant.

The Safety Appliance Acts (including the Boiler Inspection Act) apply to switch engines.

In *L. & N. R. Co.* v. *Botts*, 8 Cir., 1949, 173 F.2d 164, 167-168 (M. & S. 110), it was held that bolts on the footboard of a switch engine violated Sec. 23, BIA; that ICC rules are not all-inclusive; and that mere compliance with such rules does not excuse failure to keep the engine in a safe condition.

In *Bolan* v. *Lehigh Valley R. Co.*, 2 Cir., 167 F.2d 934, it was held that the pilot step of a switch engine was unsafe and in violation of Sec. 23 of BIA; on almost identical facts with *Botts*, *supra*.

In *Delevie* v. *Reading Company*, 176 F.2d 496, 497, the deceased fell over a power reverse gear mechanism installed horizontaliy above the metal foot walk of a switch engine. The court said that, "A locomotive engine, no single part of which is installed or maintained in violation of the Boiler Inspection Act, may still provide an unsafe place to work and so violate the act."

In the case of *United States* v. *New York Central Railroad Company*, United States District Court, New York, 70 F.Supp. 761, the New York Central Railroad had a contract with the Central Railroad to operate trains over tracks owned by the Central Railroad, and the contract provided that while that was being done the trains would be regarded as trains of the Central Railroad. While the New York Central was so operating it was found that one of the cars had a defective running board. The New York Central contended that this did not occur on its line and that the Safety Appliance Acts did not apply because it did not

own the track. The court held that the Safety Appliance Acts did apply and that the violation did occur on the line of the New York Central Railroad Company, and at 70 F.Supp. l.c. 703. (a) said:

> "An interpretation of the statute which would exonerate a carrier from liability where it has the actual physical control of the defective car on a line over which it may lawfully pass would detract from its effectiveness. Such interpretation is to be avoided."

The cases mentioned above were cited and followed by the United States Court of Appeals for the 8th Circuit in *Texas and Pacific Railway* v. *United States* 8 Cir., 189 F.2d 749, and at l.c. 752, the court said:

> "We have found no cases dealing with facts exactly like the facts in this case. Our conclusion, we think finds support in Philadelphia and R. R. R. Co. v. United States, 3 Cir., 191 Fed. 1, and United States v. New York Central R. R. Co., District Court Northern District N. Y., 70 F.Supp. 761. In both cases it is held that where one railroad under a valid agreement uses the tracks of another for the operation of its trains, the tracks of the second railroad while being used by the first are part of the first railroad lines within the meaning of the Safety Appliance Acts. And see also Gray v. L. & N. R. R. Co., District Court, Eastern District Tennessee, 197 Fed. 874, 876."

II.

The Supreme Court of Missouri Erred in Holding That There Was Not Sufficient Evidence to Take to the Jury the Question Whether the Engine in Question Was in "Use" Within the Meaning of the Boiler Inspection Act (45 U.S.C.A. 23) at the Time of the Accident Here Involved.

The Union Pacific had represented that it had completed repairs on the engine and had placed it on the de-

livery track for return to respondent (Tr. 17, 18, 19, 38, 41, 42, 45). Plaintiff and his crew had signed for the engine and taken possession of it (Tr. 17, 40, 41, 42) and were attempting to operate back to respondent's tracks to use in doing respondent's work (Tr. 19, 44).

We submit that at the time of the casualty the engine was in "use" on respondent's line. Prior to the injury, the engine had been returned to service. It was spotted in the usual place for engines returned to service (Tr. 17, 18, 19, 38, 45). The Union Pacific boss had informed plaintiff the engine was ready to go (Tr. 41, 42). The plaintiff had signed the engineer's register book taking over the engine (Tr. 17, 18, 41). The engine would be in service until it was taken out of service by the plaintiff-engineer turning the engine in by signing the engineer's register book and filing his locomotive inspection report with the engine dispatcher (Tr. 23, 24). Until that time the engine was in service and plaintiff was in charge of the engine (Tr. 53). At the very moment of injury, plaintiff was inspecting the said engine in order to ascertain whether the same should or should not be turned in and taken out of service (Tr. 19, 23, 25, 26, 44, 55, 56, 57, 63, 64). Under such circumstances, it was in use or being operated in the service of respondent within the meaning of the Boiler Inspection Act.

In the case of *Brady* v. *Terminal R. Ass'n of St. Louis*, 303 U.S. 10, 58 S.Ct. 426, the facts were (l.c. 427):

> "Petitioner was employed by the Wabash Railway Company as a car inspector in its yard at Granite City, Illinois. He was injured in November, 1927, while inspecting a car which was one of a string of cars brought by the respondent, Terminal Railroad Association of St. Louis, from St. Louis to Granite City and placed upon a track of the Wabash known as a 'receiving' or 'inbound' track. The purpose of the inspection

was to determine whether the cars were to be accepted by the Wabash.

Both the Wabash and the Terminal Companies were carriers engaged in interstate commerce.

While making his inspection, petitioner stood upon one of the side ladders of the car, and in attempting to pull himself to the top of the car, petitioner took hold of a grabiron which, with the board to which it was attached, became loose, causing him to fall. The board was found to have 'become rotten from end to end on the under side, and to some extent on the upper side around the bolts by which the grabiron was attached to it.'

Petitioner first sued his employer, the Wabash, and under the provisions of the Federal Safety Appliance Act, but a judgment in his favor was reversed upon the ground that the car had not yet been accepted by the Wabash Company which therefore had not hauled or used it, or permitted it to be hauled or used, within the prohibition of the statute. Brady v. Wabash Railway Company, 329 Mo. 1123, 49 S.W.2d 24, 83 A.L.R. 655. While that suit was pending, petitioner brought the present suit against respondent."

In that case the Supreme Court of Missouri reversed a judgment for plaintiff.

In reversing the Supreme Court of Missouri and holding there was a submissible case against the Terminal Railroad this Court there said (58 S.Ct. l.c. 428):

"The first question is whether the car can be said to have been in use by the respondent at the time in question. The statute gives no ground for holding that it was the intent of Congress that in a situation such as is here presented neither the Wabash nor the Terminal Association should be subject to the statutory duty. The 'use, movement or hauling of the defective car,' within the meaning of the statute, had not ended when

petitioner sustained his injuries. Chicago Great Western R. Co. v. Schendel, 267 U.S. 287, 291, 292, 45 S.Ct. 303, 304, 69 L.Ed. 614. The car had been brought into the yard at Granite City and placed on a receiving track temporarily pending the continuance of transportation. If not found to be defective, it would proceed to destination; if found defective, it would be subject to removal for repairs. It is not a case where a defective car has reached a place of repair. See Baltimore & Ohio R. Co. v. Hooven, 6 Cir., 297 Fed. 919, 921, 923; New York C. & St. L. R. Co. v. Kelly, 7 Cir., 70 F.2d 548, 551. The car in this instance had not been withdrawn from use. Johnson v. Southern Pacific Co., 196 U.S. 1, 21, 22, 25 S.Ct. 158, 49 L.Ed. 363; Delk v. St. Louis & San Francisco R. Co., 220 U.S. 580, 584, 586, 31 S.Ct. 617, 55 L.Ed. 590; Great Northern Railway Co. v. Otos, 239 U.S. 349, 351, 36 S.Ct. 124, 60 L.Ed. 322; Chicago Great Western R. Co. v. Schendel, supra. The car was still in use, though motionless. Minneapolis, St. Paul & Sault Ste. Marie Rwy. Co. v. Goneau, 269 U.S. 406, 409, 46 S.Ct. 129, 130, 70 L.Ed. 335. In view of that use, either the Terminal Association or the Wabash was subject to the obligation imposed by the statute.

The breadth of the statutory requirements is shown by the fact that it embraces all locomotives, cars, and similar vehicles used on any railway that is a highway of interstate commerce and is not confined exclusively to vehicles engaged in such commerce. Southern Railway Company v. United States, 222 U.S. 20, 32 S.Ct. 2, 56 L.Ed. 72. Laying down this comprehensive rule as a matter of public policy, Congress has made no exception of those employed in inspecting cars. The statute has been liberally construed 'so as to give a right of recovery for every injury the proximate cause of which was a failure to comply with a requirement of the Act.' Swinson v. Chicago, St. P., M. & O. Rwy. Co., 294 U.S. 529, 531, 55 S.Ct. 517, 79 L.Ed. 1041, 96 A.L.R. 1136. In Davis v. Wolfe, 263 U.S. 239, 243, 44 S.Ct. 64, 66, 68 L.Ed. 284, reviewing the earlier cases, the Court held that one can recover 'if the failure to

comply with the requirements of the Act is a proximate cause of the accident resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection.' Even where the required equipment is known to have become defective and the car is being hauled to the nearest available point for repairs, while the act relieves the carrier in such a case from the prescribed penalties, the carrier still remains subject by the express terms of the statute to civil liability for injuries sustained by 'any railroad employee' in the course of such a movement by reason of the defective equipment. Act of April 14, 1910, c. 160, Sec. 4, 36 Stat. 299, 45 U.S.C., Sec. 13, 45 U.S.C.A., Sec. 13. See New York, C. & St. L. R. Co. v. Kelly, supra.

We think that these considerations require the conclusion that one is not to be denied the benefit of the act because his work was that of inspection for the purpose of discovering defects. As we said in Louisville & Nashville R. Co. v. Layton, supra, the liability 'springs from its being made unlawful to use cars not equipped as required—not from the position the employee may be in, or the work which he may be doing at the moment when he is injured,' provided the defective equipment is the proximate cause of the injury.

The fact that petitioner was looking for defects of the sort which caused his injury does not prevent recovery as the statute expressly excludes the defense of assumption of risk. 45 U.S.C., Secs. 7, 54, 45 U.S.C.A., Secs. 7, 54."

In this case the engine was left only temporarily at the place where it stood at the time of the accident waiting to be moved to the place where it would be repaired and therefore was still in service.

In the case of *Lilly* v. *Grand Trunk Western R. Co.*, 317 U.S. 481, 63 S.Ct. 347, in holding the Boiler Inspection Act applicable the Court said (l.c. 351):

"The Act, like the Safety Appliance Act, 45 U.S.C.A., Sec. 1 et seq., is to be liberally construed in the light of its prime purpose, the protection of employees and others by requiring the use of safe equipment. Cf. Great Northern R. Co. v. Donaldson, supra; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U.S. 281, 295, 296, 28 S.Ct. 616, 621, 52 L.Ed. 1061; Louisville & N. R. Co. v. Layton, 243 U.S. 617, 621, 37 S.Ct. 456, 457, 61 L.Ed. 931; Swinson v. Chicago, St. P., M. & O. R. Co., 294 U.S. 529, 531, 55 S.Ct. 517, 518, 79 L.Ed. 1041, 96 A.L.R. 1136."

Respondent construes the Act, 45 U.S.C.A. 23, to require that the equipment be "in the active service" of the railroad and "in the service to which the same are put." (App. Brief, pp. 12, 17, 35). In this we submit respondent is in error.

The statute (45 U.S.C.A. 23) provides that a carrier may not use or permit the use on its line of a locomotive not proper and safe to operate "in the service to which the same is put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, * * *."

We direct attention to the fact the statute merely lays down a test as to the condition the engine must be in to meet the requirements of the Act, it does not require that the engine be "in the active service" of the railroad at the time of the accident but only that it may not use or permit to be used any engine unless it is in such condition that it is safe to use "in the active service" of the railroad.

In the case of *Brady* v. *Terminal R. Ass'n*, 303 U.S. 10, 58 S. Ct. 426, the car on which plaintiff was injured was standing on the receiving track at the time and certainly was not then in "active service," yet the act was held to be applicable. Respondent has cited no federal case making such requirement, and we have found none.

CONCLUSION.

The Supreme Court of Missouri in holding petitioner's evidence not sufficient to take to the jury the question of whether the engine was in "use" on Respondent's "line" at the time of the accident has invaded the province of the jury and its opinion conclusively shows that it failed to follow the teachings of this court in the case of *Lavender* v. *Kurn*, 327 U.S. 645, 653, 66 S. Ct. 740, 744, and later cases following that decision holding that "whenever facts are in dispute or the evidence is such that fair-minded men might draw different inferences," the issues are for the jury even though thereafter "a measure of speculation is required." The ruling of the Supreme Court of Missouri is in conflict with the decision of this Court on similar facts in the case of *Brady* v. *Terminal R. Ass'n of St. Louis*, 303 U.S. 10, 58 S. Ct. 426. Certiorari should be granted in this instance "to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction." *Rogers* v. *Missouri Pacific R. R. Co.*, 352 U.S. 500, 77 S. Ct. 443. It is clear that "the proofs justify with reason the conclusion" that the engine was in use on defendant's line. *Rogers* v. *Missouri Pacific R. Co., supra.*

Respectfully submitted,

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APPENDIX A.

IN THE SUPREME COURT OF MISSOURI
EN BANC

JANUARY SESSION, 1958

J. A. SIMPSON,
Respondent,
vs.
THE KANSAS CITY CONNECTING RAILROAD COMPANY, a Corporation,
Appellant.

No. 45,590.

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI.

HONORABLE JOHN R. JAMES, JUDGE.

This cause comes to the writer on reassignment after transfer to Court *en Banc* and the rejection of an opinion prepared in Division. It is an action for $75,000 damages for personal injuries sustained by plaintiff, a locomotive engineer employed by defendant. The defendant owned one locomotive and was engaged in the switching and moving of cars in Kansas City, Missouri, and Kansas City, Kansas, at the Kansas City stockyards. Plaintiff fell as he attempted to reboard the locomotive after he had stopped it and dismounted therefrom. He testified that, on December 26, 1950, after he had gotten down from the cab of the locomotive he noticed steam escaping from the boiler check valve or the injector; that he then went to the front end of the engine and was climbing up toward the running board when a big burst of steam came out and hit him in the face, causing him to miss the grabiron with his hand

and to fall off backwards, six feet to the ground, and sustain the injuries complained of.

Plaintiff's petition had originally contained allegations stating three grounds of recovery: (a) use on the defendant's line of an unsafe locomotive in violation of the Boiler Inspection Act (45 U.S.C.A., Sec. 23); (b) using the defective locomotive and negligently permitting an "unusual quantity of steam to escape * * * in an unusual manner"; and (c) negligently failing to furnish plaintiff with a reasonably safe place to work in that defendant negligently permitted an unusual quantity of steam to escape in an unusual manner—grounds (b) and (c) being charges of negligence under the Federal Employers' Liability Act. 45 U.S.C.A., Secs. 51-59.

Plaintiff, on the day of the trial, asked and was granted leave to amend his petition by striking the allegations of negligence under the Federal Employers' Liability Act. The record shows that the proceedings were had in chambers after the pleadings were at issue and, apparently, after the parties had announced ready for trial, since it was immediately before the *voir dire* examination of the jury panel, as follows:

"Mr. Hubbell: If your Honor please, plaintiff requests leave to amend the petition by striking from paragraph 5, sub-paragraph (b) and sub-paragraph (c), leaving the allegations of paragraph 5(a) in the petition; in other words, Your Honor, we are relying solely upon the Safety Appliance Act regarding the condition of the locomotive.

"Mr. Wimmell: When you say 'Safety Appliance Act' do you mean Boiler Inspection Act?

"Mr. Hubbell: Yes, because the Safety Appliance Act includes the Boiler Inspection Act. * * *

"Mr. Wimmell: * * * and the particular Act you are basing your suit here on is the Boiler Inspection Act?

"Mr. Hubbell: That is right."

The defendant interposed no objection and the permission requested was granted. Plaintiff then offered evidence in support of the allegations remaining in his petition after the mentioned sub-paragraphs had been stricken out. Plaintiff's own testimony was the only evidence on the issue of liability. At the close of plaintiff's evidence it was defendant's theory that the plaintiff had stated himself out of court by his own testimony tending to show that "at the time of plaintiff's accident defendant's locomotive had reached the place of repair and was not in 'use' or in 'service' on defendant's 'line' within the meaning of the Boiler Inspection Act." Accordingly, defendant presented a motion for a directed verdict in its favor which the court indicated he intended to sustain. Thereupon, the plaintiff requested the court to make an order setting aside the order granting leave to plaintiff to amend its petition by striking therefrom the two grounds for recovery under the Federal Employers' Liability Act, to wit, sub-paragraph (b) and sub-paragraph (c) of paragraph 5. The request to set aside the prior order was accompanied by a statement of purpose, to wit, "so that the plaintiff may proceed upon the basis of allegations contained in said sub-paragraphs (b) and (c) of paragraph 5."

In support of his request, the plaintiff contended that the matter of permitting the pleadings to be amended was "within the jurisdiction and power of the court, and that it would be right for this to be done." Defendant argued, "The case has been tried on the issues that remained after those provisions were stricken. The plaintiff rested and the plaintiff's case has been completed." Plaintiff's request was then denied. Thereafter, the court sustained defend-

ant's motion for a directed verdict and directed the jury to return a verdict for defendant, which was done, and judgment was entered for defendant.

Plaintiff's motion for a new trial in whole or in part was thereafter timely filed and timely sustained to the extent hereinafter stated. The defendant has appealed and assigns error on the action of the court in entering the order for a new trial. Appellant asks that said order be reversed and the cause remanded with directions to the trial court to reinstate the judgment for defendant.

In view of the conclusions we have reached a further review of the testimony offered by plaintiff on the issues involving the alleged violation of the provisions of the Boiler Inspection Act, and the resulting injury and damage to plaintiff, is not required.

A careful review of the record shows that plaintiff by his "motion for a new trial in whole or in part" sought to preserve and assign error on only two orders entered against him during the course of the trial, to wit, (1) the denial of plaintiff's request that the court make an order setting aside the order theretofore made granting leave to plaintiff to amend his petition by striking sub-paragraphs (b) and (c) of paragraph 5 of plaintiff's petition so that the plaintiff could proceed upon the basis of the allegations contained in said sub-paragraphs (b) and (c) of paragraph 5; and (2) the action of the court in sustaining defendant's motion for a directed verdict and thereby holding that plaintiff was not entitled to recover on the evidence presented as to any breach or violation of any of the provisions of the Boiler Inspection Act.

While the court sustained plaintiff's motion for a new trial, as hereinafter stated, on the basis of assignments numbered 7, 12, 13 and 14, we need only set out assignments

7 and 12 and the closing prayer of the motion, as follows: "7. The court erred and abused his judicial discretion in denying plaintiff the right to reinstate the allegations of his petition as to negligence under the Federal Employers' Liability Act and to develop the evidence on such issues since a new Action under the Act would be barred because the three-year statute of limitations has run since the date of the accident which occurred on December 26, 1950, and the only possible relief for plaintiff is reinstatement of the negligence allegations, or an amendment containing the same, in this pending action; and it is the rule in both the courts of this State and the Federal Courts that amendments will be liberally allowed to prevent a bar by the statute of limitations. * * *

"12. The court erred and abused his judicial discretion in directing a verdict for defendant and entering a final judgment against plaintiff when the evidence already introduced established a case of negligence under the Federal Employers' Liability Act for negligence in failing to exercise proper care to furnish plaintiff a reasonably safe place in which to work and reasonably safe appliances with which to work, although plaintiff had not fully developed the evidence on such issues and requested reinstatement of the allegations of his petition as to such issues and an opportunity to further develop the evidence on such issues. * * *

"Wherefore, plaintiff prays the court to enter an order granting him a whole new trial but if that is not done then he requests that the judgment be set aside as to the issues under the Federal Employers' Liability Act, leave granted to reinstate the allegations in plaintiff's petition as to such issues, and a new trial granted as to the issues of negligence under the Federal Employers' Liability Act."

The order entered by the trial court on plaintiff's motion for a new trial was as follows: "This court having heretofore heard the arguments of counsel * * * does sustain the assignments in said motion numbered 7, 12, 13 and 14, and grants plaintiff a new trial only as to the allegations of negligence under the Federal Employers' Liability Act referred to in said assignments numbered 7, 12, 13 and 14 of plaintiff's said motion on condition that plaintiff pay all court costs in this cause to date.

"And it now being made to appear to the court that plaintiff has paid the court costs to date in compliance with the order of this court, the judgment heretofore entered herein is hereby set aside and for naught held: plaintiff's motion for a new trial in whole or in part is denied as to assignments 1, 2, 3, 4, 5, 6, 8, 9, 10 and 11, but is sustained as to assignments in said motion numbered 7, 12, 13 and 14 only and the allegations of negligence under the Federal Employers' Liability Act referred to in said assignments and heretofore stricken out of plaintiff's petition by plaintiff by leave of court are hereby reinstated as follows: * * * (sub-paragraphs (b) and (c) are set out in the order) * * *.

"And now plaintiff is granted a new trial herein only as to the allegations of negligence above set forth and is denied a new trial as to all other issues. * * *."

As stated, the defendant has appealed from the order granting the new trial to plaintiff and the sole issue for decision presented by the appeal is whether the trial court committed reversible error against defendant in granting the new trial. Sec. 512.020, R.S.Mo. 1949, V.A.M.S.

The first point briefed by appellant in this court is that "at the time of plaintiff's accident defendant's locomotive had reached the place of repair and was not in 'use'

or in 'service' on defendant's 'line' within the meaning of the Boiler Inspection Act", and that plaintiff did not make a case for the jury under the assignments in sub-paragraph (a) of paragraph 5 of his petition. We need not consider that question on this appeal by defendant. The trial court directed a verdict against plaintiff on that issue and the order granting plaintiff a new trial was not based on any error with reference to the trial court's action in that respect. If the motion for a new trial was correctly ruled on the basis stated in the trial court's order, the order must be affirmed.

With reference to the grounds upon which the motion for a new trial was sustained by the trial court, appellant contends that initially the plaintiff, in amending his petition, by voluntarily striking out the allegations of negligence under the Federal Employers' Liability Act, (b) and (c), and relying upon the absolute liability imposed by the Boiler Inspection Act, sought and gained a strategic advantage and in so doing there was no "misadventure" in the plaintiff's trial theory, and therefore the trial court did not have the discretionary power after thirty days (Sections 510.330; 510.360; 510.370, R.S.Mo. 1949, V.A.M.S.) to set aside its judgment and reinstate the stricken grounds and grant plaintiff a new trial on those grounds only.

The record shows that plaintiff filed his motion for a new trial in whole or in part within ten days after the judgment appealed from was entered. The assignments in said motion numbered 7, 12, 13 and 14, complained of the action of the court in refusing to permit plaintiff to reinstate the allegations of negligence under the Federal Employers' Liability Act. This request was made after plaintiff had rested, but before the motion for a directed verdict had in fact been sustained and before any judgment had been entered for defendant. Plaintiff in his motion charged

that the court abused its discretion in refusing to make the order setting aside the order granting leave to plaintiff to amend his petition. Plaintiff had sought to reinstate the stricken assignments of negligence under the Federal Employers' Liability Act and to offer evidence thereunder. At the time this request was made the only objection interposed was that the case had been tried on the issues that remained after those provisions were stricken and that plaintiff had rested. No suggestion of prejudice to defendant, if the request had been granted, was shown, nor was there any suggestion that defendant had excused any witnesses or was otherwise unprepared to proceed. We have noted that the pleadings were at issue and the trial had been started when the plaintiff was granted leave to strike the mentioned assignments. At the time the request was made it was clearly apparent that serious prejudice to plaintiff would result, if the request was not granted, on terms or otherwise. There was evidence before the court that plaintiff was an employee of defendant engaged in interstate commerce and that on December 26, 1950, he had sustained serious personal injuries while engaged in the performance of the duties of his employment. The record also showed that plaintiff's suit had been instituted on February 27, 1953 and that the cause was being tried February 20, 1956. From the facts before the court it was determinable whether plaintiff would be finally concluded from further proceeding under the Federal Employers' Liability Act, if his request was not granted.

The fact that the court had indicated to plaintiff's counsel that he intended to sustain a motion for a directed verdict, was some evidence that, at the time, the request was made the court realized that plaintiff was proceeding on an erroneous legal theory or else that plaintiff had disappointed his counsel and had testified himself out of court

on the theory relied upon. In any case, it was then clearly apparent to the court and counsel that the cause had not been tried under the Federal Employers' Liability Act allegations before that theory was abandoned. Instead, it appeared that plaintiff had only presented his evidence under the assignments applicable to the Boiler Inspection Act and had run into difficulty and was asking the court to set aside the prior order and permit the reinstatement of the prior allegations so that he could proceed with the trial and put in additional evidence with reference to the Federal Employers' Liability Act allegations. The court was confronted with the determination of the issue upon a factual situation resting within his sound judicial discretion. Appellant concedes that "under the statutes of this state the court probably had the authority, *before judgment,* to permit amendment of the petition and reinstatement of the allegations which were abandoned * * *" since "it is settled in this state that a trial court has the discretion to permit amendments to pleadings to be made out of time before final judgment and its discretion in allowing or denying amendments will not be interfered with by the appellate courts unless the trial court has palpably abused its discretion." Appellant cites *Dyer* v. *Harper,* 336 Mo. 52, 77 S.W. 2d 106, 109 and other cases.

In the present case the court denied the request for amendment and thereafter sustained the motion for directed verdict and entered judgment for defendant, but within the time allowed by law the plaintiff filed his motion for a new trial expressly charging that the trial court had, under the factual situation then and there existing at the time, abused its discretion in denying the request for amendment.

Appellant further contends, as stated, that, "while the trial court may have had the power and discretion under

Supreme Court Rule 3.25 and Section 510.370 of the statute to set aside this judgment within 30 days after entry of the judgment, it did not have the power or discretion to set such judgment aside after the 30 days had passed for the reason that it is well established in this state that, after the 30 day period has elapsed, the power of a trial court to grant a new trial is discretionary only as to questions of fact and matters affecting the determination of issues of fact and is to be exercised only where there is error with respect to such matters so that the judgment is erroneous," citing *Cooper* v. *804 Grand Bldg. Corp.*, Mo. Sup., 257 S.W. 2d 649; *Schipper* v. *Brashear Truck Co.*, Mo. Sup., 132 S.W. 2d 993, and other cases.

The above cases are also cited as holding that, while "trial courts have wide discretion in passing on motions for a new trial where there is error in the record, * * * yet the power of the trial court to grant a new trial is discretionary only as to questions of fact and matters affecting the determination of issues of fact. There is no discretion in the law of a case, nor can there be an exercise of sound discretion as to the law of a case." *Cooper* v. *804 Grand Bldg. Corp.*, 257 S.W. 2d 649, 655.

The judgment appealed from was entered February 21, 1956, the motion for a new trial was filed March 1, 1956, and it was sustained April 17, 1956. It was sustained upon the basis of the specific grounds stated in the motion, to wit, on the grounds set forth in assignments 7, 12, 13 and 14 of the motion. These assignments had carried over the authority of the court to set aside the judgment on the basis of these assignments, until the court ruled thereon, on April 17, 1956, and within 90 days after it was filed. The motion having been timely filed the judgment was not final until the disposition of the motion by action of the court or the lapse of time, 90 days. Sections 510.340 and

510.360, R.S.Mo. 1949, V.A.M.S.; Supreme Court Rule 3.24. While at the time the motion for a new trial was ruled, the 30 day period had elapsed (Supreme Court Rule 3.25), the trial court still retained jurisdiction to rule the motion on the discretionary grounds stated therein. *Stroh* v. *Johns*, Mo. Sup., 264 S.W. 2d 304, 307, 308.

In support of the contention that "regardless of what the court could or could not have done at the time of the trial," the court had no power to set aside a valid judgment and grant a new trial "to permit amendment of the petition and trial of new issues," the appellant reviews Sections 509.490 and 509.500, R.S.Mo. 1949, with reference to the amendment of pleadings. Appellant repeatedly refers to the judgment as a valid judgment, not subject to being set aside. But if the trial court was correct in ruling the motion for a new trial, error inhered in the judgment that it set aside, the error was prejudicial to plaintiff and there had been no valid judgment. Appellant says that the latter statute "permits amendments, 'even after judgment' only where the amendment of the pleadings is necessary to conform the pleadings to the evidence."

It is apparent that appellant overlooks the fact that the order of the court sustaining the motion for a new trial in part, sustained it upon the basis of error committed in the course of the trial, since in sustaining the motion and setting aside the judgment, the court held that it had in fact abused its discretion in overruling plaintiff's request, which had been made prior to the entry of the order sustaining the motion for directed verdict and prior to the entry of the adverse judgment. We are not here concerned with any of the subsequent orders of the trial court after the order sustaining the motion for a new trial, since appellant has appealed and could only appeal from the order granting the new trial. Section 512.020, R.S.Mo. 1949, V.A.M.S.

Appellant further contends that it cannot now be claimed that the court's refusal, in the course of the trial to permit the amendment, was an abuse of discretion. Before ruling this contention, other matters must be considered. We have seen that the court sustained the motion for a new trial upon assignments numbered 7, 12, 13 and 14. Some of these assignments have been hereinbefore set out. In so sustaining the motion for a new trial the trial court held that it had abused its discretion in overruling plaintiff's request to amend. Was this order such an abuse of the court's discretion that this court on this appeal by defendant can properly set the order aside and direct that the original judgment be reinstated? The motion was clearly sustained upon a discretionary ground stated in the motion and the court had jurisdiction to sustain the motion on such a discretionary ground. *Stroh* v. *Johns, supra,* 264 S.W. 2d 304, 307. In such case, the appellate courts will usually defer to the trial court's action. *Brandenburg* v. *Kasparian,* 363 Mo. 20, 247 S.W. 2d 806, 808; *McDonald* v. *Logan,* 364 Mo. 382, 261 S.W. 2d 955, 959. Further, when a motion for a new trial is sustained and the relief requested is granted, an appellate court in reviewing the action of the trial court and in considering the grounds stated in the motion upon which the action is based will be more liberal in upholding the trial court's action, than it would be if it were reviewing the same matters when considering an appeal from a judgment entered after a motion for a new trial has been overruled. See *Teague* v. *Plaza Express Co.,* 356 Mo. 1186, 205 S.W. 2d 563, 566; *Stroh* v. *Johns, supra,* 264 S.W. 2d 304, 307.

In further support of the contentions that the court did not abuse its discretion in refusing to permit the amendment of pleadings in the course of the trial and that the court had no discretionary power to set the judgment aside

after 30 days and grant a new trial, appellant, as we have seen, insists that the purpose of plaintiff's action in amending the petition before trial was to gain a "strategic advantage" and that there was no "misadventure" in plaintiff's trial theory. Appellant particularly relies upon *Hunt* v. *Chicago, M. St. P. & P. R. Co.*, 359 Mo. 1089, 225 S.W. 2d 738; and *Smith* v. *St. Louis Public Service Co.*, 364 Mo. 104, 259 S.W. 2d 692. We think these cases have no application here. They deal with the exercise of discretion in the appellate court and not in the trial court. In neither of the mentioned cases had the defendant appealed, as here, from an order of the trial court granting a new trial to plaintiff on account of a ruling made by the trial court in the course of the trial, which action the court had subsequently determined to be erroneous and an abuse of a sound judicial discretion. And see 510.330, R.S.Mo. 1949, V.A.M.S.; Supreme Court Rule 3.22 and 3.27.

Appellant argues the allegations were stricken by plaintiff "because of the strategic advantage he gained in doing so," and that thereby "plaintiff deprived defendant of the defense of contributory negligence, one of defendant's principal defenses." Of course contributory negligence might affect the amount of recovery under the Federal Employers' Liability Act, but that cause was not tried. It has been noted that the allegations (b) and (c) were stricken before the *voir dire* examination of the jury and not after the evidence on all issues had been fully developed. It was not an election after the facts had been fully developed and all the evidence was in or after plaintiff had had the benefit of all the evidence. The cause was not tried to a jury on the basis of the allegations in subparagraphs (b) and (c). Appellant also argues that "plaintiff's attorneys undoubtedly felt that it was to their advantage to stand on the petition upon which the case was

tried and to appeal the adverse judgment." The record does not sustain that contention, because before the cause was finally submitted the plaintiff's attorneys had asked for relief and were seeking to escape the trap into which they had fallen. The request was denied in the course of the trial and not after an adverse ruling had actually been entered of record, or after a judgment had been entered thereon. After the request was denied, there was nothing left for plaintiff to do, but to let judgment go against him and to move for a new trial, as was done. No other adequate relief was available. It wasn't a case of plaintiff having elected to stand, but of being required to stand.

Appellant further says that "it should not be assumed that plaintiff could make a case under the negligence allegations which were abandoned." There is no contention that plaintiff did not state a case under the Federal Employers' Liability Act and appellant has shown no good grounds for assuming that plaintiff cannot make a submissible case under that Act, and there is no suggestion that the evidence in support of the abandoned assignments was fully developed.

We do not find that plaintiff's action in striking subparagraphs (b) and (c) was taken to gain "strategic advantage" or that it so resulted. It was a "misadventure" resulting from a mistaken idea of the facts, or a misunderstanding of the applicable law or of surprise, perhaps as to a witness's testimony. In any event, subsequently, the trial judge concluded that he had abused his discretion in denying plaintiff the permission sought, and he granted a new trial. The burden of showing that the trial court abused its discretion in granting the new trial rested upon appellant, the complaining party. *Bierman* v. *Langston*, Mo. Sup., 304 S.W. 2d 865, 868(7). And see *Ryan* v. *Campbell "66" Express*, Mo. Sup., 304 S.W. 2d 825, 827(2).

We do not find that the court abused its discretion in granting a new trial, rather we think the order of the trial court granting a new trial, under the facts shown, conforms to the general rule stated in *Houfburg* v. *Kansas City Stock Yards Co.*, Mo. Sup., 283 S.W. 2d 539, 547(16), a rule often applied even in appellate courts. And see *Snyder* v. *Jensen*, Mo. Sup., 281 S.W. 2d 819, 824(6); *Homfeld* v. *Wilcoxon*, Mo. Sup., 304 S.W. 2d 806, 811(6, 7).

The order granting a new trial is affirmed and the cause remanded.

S. P. Dalton,
Chief Justice.

All concur, except Eager, J., who concurs in result.

APPENDIX B.

IN THE SUPREME COURT OF MISSOURI
EN BANC

JANUARY SESSION, 1958

J. A. SIMPSON,
Plaintiff-Respondent,
vs.
THE KANSAS CITY CONNECTING RAILROAD COMPANY, a Corporation,
Defendant-Appellant.

No. 45,590.

On Motion for Rehearing.

Per Curiam:

The defendant-appellant, who appealed from the order of the trial court granting a new trial to plaintiff on the issues of negligence under the Federal Employers' Liability Act, has filed no motion for a rehearing against the order and judgment of this court affirming the order of the trial court granting the new trial to plaintiff, but the plaintiff-respondent has filed a motion for rehearing and again asks this court to sustain the order of the trial court upon another and additional ground, to wit, on the ground that the trial court erred in denying a new trial to plaintiff on the issues under the Boiler Inspection Act and to hold that a new trial was properly granted to plaintiff for that additional reason. Respondent urges that under the general rule of affirming orders granting new trials on any theory shown by the record, regardless of the reason or theory given by the trial court, respondents in other

cases have been permitted to urge grounds and theories impliedly or expressly denied by the trial court when it granted the new trial. See *Craton* v. *Huntzinger*, Mo. Sup., 187 S.W. 48, 53; *Thurman* v. *Wells*, Mo. App., 251 S.W. 75, 77; *Foley* v. *Union House Furnishing Co.*, Mo. App., 60 S.W. 2d 725, 729; *Kersten* v. *Hines*, Mo. Sup., 223 S.W. 586, 589; *Smith* v. *Kansas City Public Service Co.*, 328 Mo. 979, 43 S.W.2d 548; 66 C.J.S., Sec. 84, p. 263. Compare: *Sapp* v. *Key*, Mo. Sup., 287 S.W.2d 775, and *Williams* v. *Kansas City*, Mo. Sup., 274 S.W.2d 261. However, it is only where the appellate court finds the trial court erred in denying a new trial on the ground urged that the appellate court's holding, on such issue, would support the order of the trial court granting the new trial. Where the appellate court agrees with the trial court in not granting a new trial on certain specified grounds and agrees with the trial court on the reasons assigned for granting a new trial, it is unnecessary for the appellate court, on an appeal by the defendant from an order granting plaintiff a new trial, to review or determine issues, which if determined in the manner the appellate court would determine them, would not support the order granting a new trial to the plaintiff.

In this case, respondent argues that plaintiff was entitled to a new trial on the issues under the Boiler Inspection Act, as well as on the issues under the Federal Employers' Liability Act; and that *a holding to that effect* would further support the order granting the new trial to plaintiff. We fully agree with the last statement, but if, on the other hand, this court is of the opinion that the trial court was correct in not granting plaintiff a new trial on the Boiler Inspection Act issues, a ruling on that issue is unnecessary to a determination of the issues presented by the appeal and need not be ruled. A divisional opinion supporting the order granting a new trial on the theory

mentioned by respondent failed of adoption by the unanimous vote of the court *en banc* and a ruling on that issue would not support the order of the trial court granting the new trial to plaintiff, hence we do not rule it here.

Respondents' motion for rehearing, or in the alternative for modification and clarification of opinion is overruled.

APPENDIX C.

IN THE SUPREME COURT OF MISSOURI
DIVISION NUMBER TWO

JANUARY SESSION, 1957.

J. A. SIMPSON,
Respondent,

vs.

THE KANSAS CITY CONNECTING RAILROAD COMPANY, a Corporation,
Appellant.

No. 45,590.

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT INDEPENDENCE, DIVISION NO. 12.
HONORABLE JOHN R. JAMES, JUDGE.

Mr. J. A. Simpson, an engineer, fell from the running board of a locomotive and to recover damages for his resulting injuries instituted this action against his employer, Kansas City Connecting Railroad Company. Originally, in his petition, he set forth and relied upon three grounds of recovery: (a) use on the defendant's line of an unsafe locomotive in violation of the Boiler Inspection Act (45 U.S. C.A., Sec. 23); (b) using the defective locomotive and negligently permitting an "unusual quantity of steam to escape * * * in an unusual manner"; and (c) negligently failing to furnish plaintiff with a reasonably safe place to work in that defendant negligently permitted an unusual quantity of steam to escape in an unusual manner; grounds (b) and (c) being, of course, charges of negligence under the Federal Employers' Liability Act. 45 U.S.C.A., Secs.

51-59. On the day the trial began plaintiff's counsel, by leave of court, amended the petition by "striking from Paragraph 5, sub-paragraph (b) and sub-paragraph (c), leaving the allegations of Paragraph 5 (a)." At the time plaintiff's counsel announced that they were "relying solely" upon the Boiler Inspection Act. At the conclusion of the plaintiff's evidence, the record recites, defense counsel presented their motion for a directed verdict, whereupon there was a conference between judge and counsel in the judge's chambers. Upon returning to the courtroom plaintiff's counsel said: "The Court having indicated that the Court intends to sustain the motion for a directed verdict, the plaintiff requests the court to make an order setting aside the order heretofore made granting leave to plaintiff to amend the petition, and the plaintiff requests the Court to set aside the order heretofore made striking sub-paragraphs (b) and (c) * * * of plaintiff's Petition, so that the plaintiff may proceed upon the basis of the allegations contained in said sub-paragraphs (b) and (c) * * *." The court sustained defense counsel's objection to the proposal and announced that the motion for a directed verdict would be sustained. Whereupon the court directed the jury to return a verdict for the defendant and accordingly entered judgment, including costs, against the plaintiff. In due time plaintiff filed what he denominated "Motion for a New Trial in Whole or in Part." The motion set forth fourteen grounds for a new trial, four of which (7), (12), (13) and (14), had to do with subparagraphs (b) and (c) of the original petition and the plaintiff's right and the court's discretion to permit their being reinstated as grounds of recovery. After the motion had been on file forty-five days the court entered an order granting a new trial on grounds (7), (12) (13) and (14) only, and accordingly ordered grounds (b) and (c) reinstated; the

other ten grounds of the motion were specifically denied which, of course, denied a new trial under the Boiler Inspection Act. The railroad has appealed from the order granting plaintiff a new trial and urges that the judgment should be reversed and the cause remanded with directions to reinstate the judgment in favor of the defendant.

Upon this appeal the parties have briefed and argued various and sundry questions and problems (sometimes citing long lists of rather irrelevant cases (Supreme Court Rule 1.08)), some of them admittedly outside the record and beside the mark. The principal question briefed and argued by the appellant railroad is that initially the plaintiff, in amending his petition, by voluntarily striking out the allegations of negligence under the Federal Employers' Liability Act, (b) and (c), and relying upon the absolute liability imposed by the Boiler Inspection Act, sought and gained a strategic advantage and in so doing there was no "misadventure" in the plaintiff's trial theory, and therefore the trial court did not have the discretionary power after thirty days (V.A.M.S., Secs. 510.330; 510.360; 510.370) to set its judgment aside and reinstate the stricken grounds and grant plaintiff a new trial on those grounds only. But, if the court's action in granting a new trial is sustainable on any ground or theory, as the respondent urges, that disposes of this appeal and it is not necessary to consider any other question or problem. *Holmes* v. *McNeil*, 356 Mo. 763, 203 S.W.2d 665; 5 C.J.S., Sec. 1464 (a) (d) (g), pp. 72-92. Since the plaintiff did not appeal from the order which specifically denied him a new trial under the Boiler Inspection Act, ground (a), the railroad urges that he may not complain now of the court's ruling in that regard because he does not seek to "sustain" the court's ruling but, on the contrary, seeks to "overturn" the court's order. But under the general rule of affirming orders granting new

trials on any theory shown by the record, regardless of the reason or theory given by the trial court, respondents have been permitted to urge grounds and theories *impliedly denied* by the trial court. *Craton* v. *Huntzinger*, (Mo.) 187 S.W. 48, 53; *Thurman* v. *Wells*, (Mo. App.) 251 S.W. 75, 77; *Foley* v. *Union House Furnishing Co.*, (Mo. App.) 60 S.W.2d 725, 729; *Kersten* v. *Hines*, (Mo.) 223 S.W. 586, 589; *Smith* v. *Kansas City Public Service Co.*, 328 Mo. 979, 43 S.W.2d 548; 66 C.J.S., Sec. 84, p. 263.

Compare: *Sapp* v. *Key;* (Mo.) 287 S.W.2d 775, and *Williams* v. *Kansas City*, (Mo.) 274 S.W.2d 261. The plaintiff excepted to the court's denial of his right to a new trial under the ten grounds relating to the Boiler Inspection Act and we can see no distinguishing reason why he should now be denied the right to urge and demonstrate that he did make a case under the act and that the court erroneously directed a verdict against him on that ground or theory.

All the facts concerning the Kansas City Connecting Railroad are not made to appear, but, admittedly, it is engaged in interstate commerce, transporting livestock and feed to and from other railroads to the stockyards in the Kansas City terminal area. Except for its approximately eight-mile connecting line and switch tracks, the railroad operates over the tracks of other railroads and has but a single locomotive, the one involved in this suit. It has no roundhouse or yard facilities for repairing the engine and so entered into a verbal agreement under which the Union Pacific Railroad repaired the engine from time to time with Union Pacific crews in its yards and roundhouse in Kansas City, Kansas. Steam had been leaking from around the injector and boiler check valve for some time and on December 23, 1950, Mr. Simpson and his crew took the engine to the Union Pacific's yards for repairs. He "spotted" the engine on track number one at the customary place, "right

beside the oil house," and went to the engine dispatcher's office. There he signed a "locomotive inspection report," detailing nine items for repairs including repairs to "boiler check" and "overflow pipe on left injector," and left the engine to be repaired.

A Christmas week end intervened and Mr. Simpson did not return to work until Tuesday, December 26, 1950. On that day he and two members of a crew, a fireman and a brakeman, walked over to the Union Pacific roundhouse. He said, when he got to the engine dispatcher's office, "I looked up the track and seen the engine parked in the usual place, and after I signed the register, registered with my name and the engine number and the date and time I was going to take the engine out, I walked straight up to the engine there." It was "spotted" on the west side of the oil house on No. 1 track, "the outbound rail," headed south, and he said, "I gave her inspection as I came around." He got on the engine, looked at the gauges and they appeared to be "all right" and he moved the engine forward and had proceeded two or three engine lengths when blinding steam came off from the fireman's side and he stopped the engine. He then backed it up and again "spotted" it close to the engine dispatcher's office and, after he got down from the cab, saw steam escaping from either the injector or the boiler check valve. He got up on the front end of the engine "where the running-board is" and before he reached the running board "there was a big burst of steam came out and hit me in the face and I fell off backwards six foot to the ground." He testified that it was a part of his duty to inspect what appeared to be something wrong with the engine and that if he had not fallen and been injured would have filled out another locomotive inspection report and left it with the engine inspector.

On cross-examination Mr. Simpson testified that he always left the engine at the oil house, "that is all we had to do," and he always picked it up at the same place. When he went to the dispatcher's office, he said, "there was a boss in there told me that the engine was ready," but he could not remember who "the boss" was. He testified that he backed the engine up so he could complete his examination and "turn the engine report in by registration, and file the locomotive inspection report." He said, after seeing the escaping steam, that there was more repair work to be done on the engine and that he did not intend to move it again "unless it was fixed." He insisted however, that the original repairs had been completed; he said, "Yes, it was completed or it would have been setting some other place, it wouldn't have been setting out there where it was. Q. If they were completed why did you take it back down there by the roundhouse? A. Somebody made a mistake." It was his opinion that the engine was leaking more on the 26th than it had been on the 23rd when he took it over and that the leaking burst of steam came from the vicinity of the "boiler check valve and that injector," although he did not tell anyone for more than a year that that was the cause of his missing the grab iron and falling.

The key words in the Boiler Inspection Act are "use or permit to be used on its line"; "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive * * * and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, * * *," 45 U.S.C.A., Sec. 23. In the circumstances detailed the appellant railroad contends that the locomotive was not in use on its line when Mr. Simpson was injured and therefore he did not make or have a submissible case under the act. It is argued that the engine was in need of repairs and had

been withdrawn from service for the purpose of making the repairs and so was not in "use * * * on its line" within the meaning of the act. It is said that here the railroad had an arrangement whereby its locomotive "when removed from service" would be moved to Union Pacific's roundhouse for repairs "and when it was on the Union Pacific's tracks it was never in use." The appellant partially recognizes the crux of the case in this statement from its brief: "Respondent argues, however, that defendant's locomotive was in 'use' on defendant's line and says that *prior to plaintiff's injury the engine had been returned to service.* It is true respondent testified that the Union Pacific boss informed him that the engine was ready to go and testified that he had signed the register book taking over the engine. But the evidence was undisputed that *this locomotive,* so long as it was on Union Pacific tracks at or near its roundhouse, was there only for the purpose of repair and that it *could not be put into service until it had been returned to the defendant's tracks.*" (Italics supplied). This partial recognition of the problem does not precisely present the question to be resolved, however. Broadly speaking, the question is whether in the detailed circumstances the locomotive had been returned to service. In practical effect and perhaps more accurately the problem is contained in these facts: that the engine had been repaired, supposedly; that Mr. Simpson had signed the register, taken possession of the locomotive, moved it forward two or three engine lengths and then returned it for future repairs because 'Somebody made a mistake." In these briefly epitomized circumstances was the locomotive in use on the defendant's line when Mr. Simpson fell and was injured". The appellant points to Mr. Simpson's testimony, after he was told that the engine was ready to go and after he had inspected it and moved it forward two or three engine lengths, that he stopped the forward motion, backed it up

and spotted it near the dispatcher's office and did not intend to move it again until it had been repaired and therefore argues that it could not have been in service or use on its line.

Admittedly, there are no cases precisely in point. It is true, under the verbal arrangement, that the engine was to be repaired in Union Pacific's yards and roundhouse and that while in its yards after being turned over to it for the purpose of repairs, or during repairs, and before being returned to the appellant was withdrawn from service and during the period of withdrawal was not in use. *Lyle* v. *Atchison, T. & S. F. Ry. Co.*, 177 F.2d 221; *Harlan v. Wabash Ry. Co.*, 335 Mo. 414, 73 S.W.2d 749. Preparing a car or locomotive for use, a "bad-order" car temporarily on a "ladder track," or a car on storage tracks for repairs, no movement being contemplated immediately, are not in use on the railroads' lines within the meaning of the act. *Flack* v. *Atchison, T. & S. F. Ry. Co.*, 285 Mo. 28, 224 S.W. 415; *Sherry* v. *Baltimore & O. R. Co.*, 30 F.2d 487; *McCalmont* v. *Pennsylvania R. R. Co.*, 283 Fed. 736; *N. Y., C. & St. L. R. Co.* v. *Kelly*, 70 F.2d 548. However, jointly making up a train on a terminal's track, with a terminal crew, is a use on the railroad's line. *Hood* v. *Baltimore & O. R. Co.*, 302 Mo. 609, 259 S.W. 471. And the fact, under the verbal agreement, that the locomotive was on the Union Pacific's track in its yard is not in and of itself conclusively determinative that the engine was then withdrawn and not in use. The Kansas City Connecting Railroad had a right to use Union Pacific's tracks and the question is whether, in the circumstances, it was then using the locomotive in its service although on Union Pacific's track. *Gray* v. *Louisville & N. R. Co.*, 197 Fed. 874; *Philadelphia & Reading Ry. Co.* v. *U. S.*, 191 Fed. 1; *United States* v. *New York Central R. Co.*, 70 F.Supp. 761. In this connection it is well to com-

pare the cases in which the defective car had been delivered and received and those in which delivery had not been completed and control had not been assumed. *Patton* v. *Baltimore & O. R. Co.*, 197 F.2d 732; *Texas & P. Ry. Co.* v. *U. S.*, 189 F.2d 749.

While there are no controlling cases directly in point there is some analogy in the very interesting Brady cases. Brady, a car inspector employed by the Wabash Railroad, was injured while inspecting a car in the Wabash yards; as he climbed a ladder the grab iron on the top of the box car pulled loose from its fastenings. The car was one of a cut of cars brought into the yards by the Terminal Railroad and placed on the "receiving" or "inbound" track, and the purpose of Brady's inspection was to determine whether the cars would be accepted or rejected by the Wabash. Brady first sued his employer, the Wabash, and this court held that the Wabash was not liable under the Safety Appliance Act because it was not shown that the car was being "hauled or permitted to be hauled or used on its line"; that "use" by the Wabash had not commenced and liability would not attach before acceptance and actual present use. *Brady* v. *Wabash Ry. Co.*, 329 Mo. 1123, 49 S.W.2d 24. While this case was pending Brady sued the Terminal Railroad and this court, *en banc*, held that the Terminal was not "using the car or permitting it to be used on its line at that time and place" and so was not liable under the Safety Appliance Act. *Brady* v. *Terminal Railroad Assn.*, 340 Mo. 841, 102 S.W.2d 903. But when the latter case reached the Supreme Court of the United States Mr. Chief Justice Hughes made the observation that "The statute gives no ground for holding that it was the intent of Congress that in a situation such as is here presented neither the Wabash nor the Terminal Association should be subject to the statutory duty." And he said, although the car

was in the Wabash yards, that "The 'use, movement or hauling of the defective car' within the meaning of the statute, had not ended when petitioner sustained his injuries." He said that the car was on the receiving track temporarily pending the continuance of transportation and if not found to be defective, would proceed to destination, and if found defective, would be subject to removal for repairs. "It is not a case where a defective car has reached a place of repair. * * * The car in this instance had not been withdrawn from use. * * * The car was still in use, though motionless. * * * In view of that use, either the Terminal Association or the Wabash was subject to the obligation imposed by the statute." And it was held that the Terminal's responsibility did not end when it brought the car into the yards because the "Wabash had not accepted it," thereby assuming control of it, and so the Terminal was liable under the act. *Brady v. Terminal Railroad Assn.*, 303 U.S. 10, 58 S.Ct. 426, 82 L.Ed. 614. See also *Chicago, Great Western R. Co. v. Schendel*, 267 U.S. 287, 45 S.Ct. 303, 69 L.Ed. 614.

From the plaintiff's testimony the permissible inferences are that the initially designated repairs had been made, that the engine was ready for delivery, that in signing the register, inspecting the engine, and moving it forward on the outbound track Mr. Simpson had accepted the locomotive, assumed control of it on behalf of his employer, and so it was in use on a line over which the Kansas City Connecting Railroad had a right to operate, in fact over which of necessity it had to operate at some point in the process of withdrawal, repair and delivery even though it had to again be returned for other repairs because "Somebody made a mistake." In short, reasonable minds could differ and the circumstances were sufficient to permit a finding by a jury that the locomotive was in use on the defendant's line and the contrary inference should not have

been declared as a matter of law. *Minehart* v. *Southern Pacific Co.*, 136 Cal. App. 2d 486, 288 P.2d 999; *Blazin* v. *Southern Pacific Co.*, 127 F.Supp. 20; *Brady* v. *Terminal Railroad Assn., supra.*

In accordance with these views that part of the order denying plaintiff a new trial under the Boiler Inspection Act is set aside, in other respects the order granting a new trial is affirmed and the cause remanded.

Paul W. Barrett,
Commissioner.

Bohling, C., Concurs.
Stockard, C., Concurs.

Per Curiam: The foregoing opinion by Barrett, C., is adopted as the opinion of the Court.

Storckman and Leedy, J. J., concur;

Eager, P. J., dissent in part in memorandum filed.

IN THE SUPREME COURT OF MISSOURI
DIVISION NUMBER TWO
JANUARY SESSION, 1957.

J. A. SIMPSON,
Respondent,
vs.
THE KANSAS CITY CONNECTING RAILROAD COMPANY, a Corporation,
Appellant.
No. 45,590.

Dissenting Opinion.

I dissent, in part, for the reason that I do not believe the engine was in "use," within the meaning of the Boiler Inspection Act, at the time of plaintiff's injury. Consequently, I feel that the order of the trial court should be affirmed.

Henry I. Eager,
Presiding Judge.

APPENDIX D.

The Boiler Inspection Act—45 U.S.C., Section 23.

USE OF UNSAFE LOCOMOTIVES AND APPURTENANCES UNLAWFUL; INSPECTION AND TESTS.

It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28-30 and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for. February 17, 1911, c. 103, § 2, 36 Stat. 913; March 4, 1951, c. 169, § 1, 38 Stat. 1192; June 7, 1924, c. 355, § 2, 43 Stat. 659.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 171.

J. A. SIMPSON,
Petitioner,

vs.

THE KANSAS CITY CONNECTING RAILWAY COMPANY, a Corporation,
Respondent.

RESPONDENT'S BRIEF.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 171.

J. A. SIMPSON,
Petitioner,

vs.

THE KANSAS CITY CONNECTING RAILWAY COMPANY, a Corporation,
Respondent.

RESPONDENT'S BRIEF.

STATEMENT OF CASE.

Petitioner has stated the facts but has made some statements inaccurately and has omitted other controlling facts. These facts will be referred to in respondent's argument. The principal inaccuracies and omissions are the following: On Page 8 petitioner says that when the engine began leaking steam, "plaintiff backed the engine up

to the place for delivery to the Union Pacific for repairs." This is an inaccurate statement of important and controlling facts. The evidence was undisputed that when plaintiff found that the engine was leaking steam he backed it up but he did not leave it at the point near the oil house which was the place the Union Pacific had designated (Tr. 15, 16, 19, 37, 38 and 39), but he backed it approximately a block or a little further (Tr. 49) and parked it at a spot to the west of and close to the engine dispatcher's office near the roundhouse (Tr. 19, 20, 44, 45). In moving the engine from the place near the oil house to the spot near the dispatcher's office close to the roundhouse, plaintiff was doing the work normally done by hostlers of the Union Pacific (Tr. 46, 48). When plaintiff reached this spot he got down from the engine and he testified that he did not intend to move it any more until the additional repairs were made (Tr. 46).

A second inaccuracy with respect to important and controlling facts is the statement by petitioner (p. 9) that at the time of plaintiff's accident the engine was not at the place where repairs were to be made. This statement is inaccurate and misleading in that it infers that some substantial movement of the engine was needed to take it to the place of repair when in fact the undisputed evidence shows that at the time the engine was setting just outside the roundhouse on a track that entered the roundhouse (Tr. 19, 20, 44, 45 and Pl. Ex. 2).

ARGUMENT.

I.

The Petition Should Be Denied Because the Petitioner Is Seeking to Obtain Certiorari on a Question Which the Supreme Court of Missouri Found Unnecessary to Decide.

Under Supreme Court rules 19 (a) and 23 (f) certiorari is granted only where the state court has *decided* a federal question not determined by this Court, or has *decided* it in a way probably not in accord with applicable decisions of this Court. In this case the Supreme Court of Missouri found it unnecessary to decide any question concerning the Boiler Inspection Act.

When the case was tried, the trial court held that plaintiff did not make a case under the Boiler Inspection Act and sustained defendant's motion for a directed verdict (Tr. 88). Later the trial court granted plaintiff a new trial on the negligence allegations in his petition but denied a new trial of his allegations based on the Boiler Inspection Act. Defendant appealed to the Supreme Court of Missouri from the order granting plaintiff a new trial under the negligence allegations, but plaintiff did not appeal from the order denying him a new trial of his Boiler Inspection Act allegations. Under these circumstances, the Supreme Court of Missouri, *en banc*, held that on defendant's appeal and with no appeal by plaintiff, it was unnecessary that the Court decide questions concerning the Boiler Inspection Act. The Court said (Petitioner's Brief P. A-6):

"The first point briefed by appellant in this court is that 'at the time of plaintiff's accident defendant's

> locomotive had reached the place of repair and was not in "use" or in "service" on defendant's "line" within the meaning of the Boiler Inspection Act', and that plaintiff did not make a case for the jury under the assignments in sub-paragraph (a) of paragraph 5 of his petition. We need not consider that question on this appeal by defendant. The trial court directed a verdict against plaintiff on that issue and the order granting plaintiff a new trial was not based on any error with reference to the trial court's action in that respect. If the motion for a new trial was correctly ruled on the basis stated in the trial court's order, the order must be affirmed."

The reason for such ruling is that it is well established in Missouri that if the order of the trial court includes portions adverse to respondent he cannot attack such portions on appellant's appeal if he did not cross appeal. *St. Charles Bank* v. *Denker,* 275 Mo. 607, 205 S.W. 208; *Caldwell* v. *Travelers Insurance Co.,* 305 Mo. 619, 267 S.W. 907; *Lewis* v. *Lewis,* 354 Mo. 415, 189 S.W. 2d 557; *State* v. *Palmer,* (Mo. *En Banc*) 198 S.W. 2d 10; *Thorp* v. *Daniel,* 339 Mo. 763, 99 S.W. 2d 42; *Botto* v. *James,* (Mo. Sup.) 209 S.W. 2d 256.

This is also the rule in the federal courts. In *Morley Construction Co.* v. *Maryland Casualty Co.,* 300 U.S. 185, 57 S. Ct. 325, 81 L. Ed. 593, the Court said, 300 U.S. l.c. 191:

> "Without a cross-appeal, an appellee may 'urge in support of a decree any matter appearing in the record although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.' *United States* v. *American R. Expr. Co.,* 265 U.S. 425, 435, 68 L. Ed. 1087, 1093, 44 S. Ct. 560. What he may not do in the absence of a cross appeal is to 'attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he

seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below.' *Ibid.* The rule is inveterate and certain." (many cases cited).

Plaintiff filed a motion for rehearing in the Supreme Court of Missouri still seeking to have the Court decide the same issue. In its *Per Curiam* opinion on motion for rehearing (shown at Page 16 of the Appendix to the Petition for Certiorari), the Court said (A-17):

> "A divisional opinion supporting the order granting a new trial on the theory mentioned by respondent failed of adoption by the unanimous vote of the court en banc and a ruling on that issue would not support the order of the trial court granting the new trial to plaintiff, hence we do not rule it here."

Accordingly, the Supreme Court of Missouri found it unnecessary to consider the issue upon which petitioner bases his petition for certiorari. In the motion for rehearing, the Court by dicta indicated that if it had gone into the issue, it would have ruled such issue adversely to plaintiff but nevertheless, for the reasons stated, the Court did not rule such issue and it is only upon the inferences and dicta that petitioner seeks certiorari in this Court.

Petitioner has set forth in the Appendix beginning at Page A-19 the divisional opinion but this opinion, because of the dissent of one of the judges, did not become the opinion of the Court, but instead the case was transferred to the Supreme Court, *en banc*, and its opinion under the law of Missouri becomes the only opinion in the case just as though the case had never been before Division 2 of the Court at all. This is the law in Missouri as decided by the Court, *en banc*, *Hall* v. *Brookshire*, 267 S.W. 2d 627, 364 Mo. 774, and cases there cited.

This Court has held that it will concern itself only with the decision of the Missouri Supreme Court, *en banc*.

Gorman v. *Washington University*, 316 U.S. 98, 62 S. Ct. 962, 86 L. Ed. 1300.

Accordingly, for the foregoing reasons, the petition for certiorari should be denied as the Supreme Court of Missouri for good reason and under the law of Missouri, refused to rule the issue which the petitioner did not preserve for review by appeal.

II.

The Petition for Certiorari Should Be Denied Because It Is Not Based upon Need for Determining an Important Question of Law but Rather upon Questions of Fact As to Which Petitioner Has Failed to Mention Undisputed and Controlling Facts Shown in Evidence.

There are no special and important reasons for granting certiorari in this case. The ruling of the trial court that plaintiff did not make a case under the Boiler Inspection Act (the point not ruled by the Supreme Court) is in accord with and not contrary to the decisions including those of this Court. In the next point the cases will be briefly considered. At this time we merely call the Court's attention to the fact that petitioner is not claiming that an important question of law must be decided but is merely claiming that there was sufficient evidence to make a case for the jury on the issue as to whether defendant's locomotive was in "use" and in "service" on defendant's "line" within the meaning of the Boiler Inspection Act, 45 U.S.C.A., Sec. 23.

Under the decisions, the Boiler Inspection Act does not apply if the locomotive is not in "use" and in "service" but has reached the place of repair. *Brady* v. *Terminal Railroad Association of St. Louis*, 303 U.S. 10, 58 S. Ct. 426, 82 L. Ed. 614; *New York C. & St. L. R. Co.* v. *Kelly*,

70 F. 2d 548, Cer. Denied 293 U.S. 595, 55 S. Ct. 110; *Sherry v. Baltimore & Ohio R. Company,* 30 F. 2d 487, Cer. Denied 280 U.S. 555, 74 L. Ed. 611.

Petitioner, however, argues the facts, claiming that the locomotive was in "use" and in "service" and that it had not reached the place of repair but in doing so has failed to mention admitted and undisputed facts showing that defendant's locomotive was not in "use" and in "service" and had reached the place of repair.

It is well established that this Court will not, on petition for certiorari, enter into a minute examination of evidence in a case of this kind. *Boehmer* v. *Pennsylvania Railroad Company,* 252 U.S. 496, 64 L. Ed. 680; *Chicago Junction R. C.* v. *King,* 222 U.S. 222, 56 L. Ed. 173. But in case the Court may want to examine the evidence, we will briefly summarize the admitted facts and then point out those controlling facts which are not mentioned by petitioner.

In December, 1950, petitioner, plaintiff, J. A. Simpson, a locomotive engineer, was in the employ of defendant, Kansas City Connecting Railroad Company, a railroad operating one locomotive, engaged in the switching and moving of cars in Kansas City, Missouri, and Kansas City, Kansas, at the Kansas City stockyards (Tr. 12, 13). Having no facilities for repairing and servicing its one locomotive, the defendant had made an arrangement with the Union Pacific Railroad Company to make repairs to defendant's locomotive. Under this arrangement the Union Pacific made such repairs at its roundhouse with its crews under its supervision and control and was paid its charges therefor by the defendant, Kansas City Connecting Railroad Company (Tr. 81).

On Saturday, December 23, 1950, plaintiff, the engineer, and his crew took the locomotive to the Union Pacific roundhouse in Kansas City, Kansas, for repairs. The locomotive was moved from the defendant's tracks on to the tracks of the Union Pacific, and while on the Union Pacific's tracks, it was handled and operated by defendant's crew under the rules and regulations of the Union Pacific (Tr. 37, 38).

The locomotive was left at a place near the oil house on No. 1 Union Pacific track, as this was the place which the Union Pacific had designated as the place where such locomotive and other locomotives of the Union Pacific should be placed when in need of repairs (Tr. 15, 16, 19, 37, 38, 39).

For many years it had been the practice of defendant's crew to leave the locomotive at this place near the oil house and to pick it up, after the repairs were made, at the same place (Tr. 37). It was the duty and responsibility of the Union Pacific hostlers or other employees to move the locomotive from the track near the oil house to the roundhouse, and the defendant and its crew had no responsibility to move it from the oil house to or near the roundhouse. It was the responsibility of defendant's crew to leave the locomotive near the oil house and to pick it up at the same place after the repairs were made (Tr. 38, 39).

Plaintiff did not work over the week end nor on Christmas Day. He returned to work on December 26, 1950, and after reporting for work, he and his fireman and switchman went to the Union Pacific roundhouse in Kansas to get the locomotive (Tr. 17, 43, 39). He saw the engine parked near the oil house, the usual and customary place for delivery after repairs and went to the train dispatcher's

office (Tr. 17, 18, 19, 38, 45). The roundhouse boss told plaintiff the engine was ready for service (Tr. 41, 42) and he and his fireman and switchman then walked out to the engine (Tr. 17, 42, 40).

Plaintiff then moved the engine forward about two or three engine lengths and when a lot of steam came off the fireman's side he stopped (Tr. 19, 44).

There followed according to plaintiff's own testimony conduct which the trial court felt showed beyond question that the locomotive was not at the time of plaintiff's accident in "use" and in "service" within the meaning of the Boiler Inspection Act. In his petition for certiorari, the petitioner, while arguing that the locomotive was in "use" and in "service", and that it had not reached the place of repair, fails to disclose to this Court these facts.

When plaintiff found that the locomotive was still leaking steam, he then backed the engine up, but he did not leave it on the track near the oil house, but backed it up a distance of approximately a block or a little further (Tr. 49), and parked it at a spot to the west of and close to the engine dispatcher's office near the roundhouse (Tr. 19, 20, 44, 45). In moving the locomotive from the place near the oil house to the spot near the dispatcher's office, plaintiff was doing the work normally done by hostlers of the Union Pacific (Tr. 46, 48). When plaintiff reached the spot near the dispatcher's office he stopped it, got down from the engine and did not intend to move it any more until the additional repairs were made (Tr. 46).

> Q. When you got to this point, you stopped it where you intended to stop, didn't you, this point by the dispatcher's house (indicated on exhibit)?
>
> A. Yes.
>
> Q. You didn't intend to move that any more, did you?

A. Not unless it was fixed.

Q. Well, now, the Union Pacific hostler could have moved it from the oil house back there, couldn't he?

A. Yes, he could, but he didn't.

Q. As a matter of fact, you were just doing their work when you did it?

A. Maybe so, but it didn't make any difference, it had been done that way before.

It was after the locomotive was taken back to the spot near the dispatcher's office and after he had stopped it and did not intend to move it any more, that his accident occurred while he was making an inspection preliminary to a report he intended to prepare.

Petitioner has failed to mention the above facts in submitting to this Court his argument that the locomotive was in "use" and in "service" at the time of plaintiff's accident.

As stated above, all the cases hold that when a locomotive or car reaches the place of repair, it cannot be in "use" and in "service" within the meaning of the Boiler Inspection Act or Safety Appliance Acts. In his petition for certiorari in this case, petitioner states (page 9):

> "The engine was not at a place where the repairs were to be made but would be moved by the Union Pacific Hostlers from that point to the roundhouse where the repairs were to be made (the repairs could not be made outside), and after repairs would return it to the re-delivery point (Tr. 5, 45)."

In making this statement, petitioner fails to disclose to this Court the undisputed facts showing that at the time of plaintiff's accident, the locomotive had actually reached the place of repair in that it was setting just outside the roundhouse on a track that entered the roundhouse (Tr. 19, 20, 44, 45 and Pl. Ex. 2). In making the argument that the en-

gine had not reached the place of repair because the locomotive had to be moved into the roundhouse, petitioner makes a contention so strained and unrealistic that it approaches absurdity.

At the trial of this case, plaintiff introduced in evidence as Exhibit 2 an aerial photograph showing the roundhouse and scene where the accident occurred. We understand that this photograph which constitutes important evidence in this case has not been made a part of the transcript of the record filed with this Court. We are attaching to this brief copy of such exhibit 2 for the reason it clearly shows the unsoundness of the contention that the locomotive had not reached the place of repair. At the trial plaintiff wrote on this photograph an "X" at the point near the oil house, the place which the Union Pacific had designated as the place where such engine and other engines of the Union Pacific should be placed when in need of repairs (Tr. 22, 15, 16, 19, 37, 38, 39). He marked an "X 1" at the place where the engine was located when the accident occurred (Tr. 22). In moving the locomotive from the place near the oil house (marked "X") to the spot near the roundhouse and the dispatcher's office (marked "X 1") plaintiff was doing the work normally done by hostlers of the Union Pacific (Tr. 46, 48). When plaintiff reached the spot marked "X 1" and stopped the engine he testified that he did not intend to move it any more until the additional repairs were made (Tr. 46).

If the Court will look at the attached photograph it will be readily observed that the point marked "X 1" where the accident occurred is almost at the entrance into the roundhouse, and yet it is petitioner's contention that the engine had not reached the place of repair because it had yet to be moved the few additional feet into the roundhouse. The tracks leading into the roundhouse were roundhouse

tracks and the evidence in this case was undisputed that the place where engines were to be left when in need of repairs was near the oil house (Tr. 22, 15, 16, 19, 37, 38, 39). When plaintiff moved the engine further, doing the work normally done by the hostlers, he moved it right up close to the roundhouse and yet respondent in an attempt to sustain certiorari claims, as he must under the decisions claim, that the engine had not reached the place of repair and that it was still "in service" on "defendant's line." To claim that the locomotive had not reached the place of repair because it still had to be moved a few feet into the roundhouse is, to say the least, most unrealistic. It is obvious that locomotives when moved to a roundhouse cannot all actually be placed inside the roundhouse but must be placed on adjoining tracks and that the place of repair is reached when this occurs.

The facts of this case may be illustrated by an every day transaction. Suppose you take your automobile to a garage for repairs. The garage has a designated place where automobiles are left and where a report is made out concerning the repairs or services needed. Garage employees ordinarily move automobiles from such place to the designated portions of the repair shop where the work is done just as hostlers of the Union Pacific ordinarily moved defendant's locomotive from the oil house to the place where the work was done. Suppose, however, as you start to drive your automobile away you find that it is still not operating properly and you take it back, but instead of leaving it at the designated place, you move it back closer to the work stalls expecting quicker service. You leave the automobile at a place near the work stalls intending to move it no further and intending to make a further report concerning the additional work that may be required. Can it be claimed that the automobile has not

reached the place of repair? Doesn't it reach the place of repair when you first leave it at the designated spot, and isn't the case made even more clear when you move the automobile down near the work stalls, a movement ordinarily handled by the garage employees? We think the instant case is comparable and that there is no reasonable basis for claiming that the locomotive had not reached the place of repair simply because it had not been placed in a stall inside the roundhouse.

III.

The Petition for Certiorari Should Be Denied Because under the Law and the Decisions, It Is Clear That the Engine Was Not in "Use" and in "Service" on Defendant's Line at the Time of Plaintiff's Accident.

The purpose of Congress in enacting the Boiler Inspection Act (45 U.S.C.A. 23) was to fix liability on the railroad if it continued to use in its service in moving traffic on its line a defective locomotive but to protect the railroad from liability where these conditions do not exist. When the bill was before Congress in 1911, it was passed after being reported out favorably by the committee. The committee report which is House Report No. 1974, 61st Congress, Third Session (see Congressional Record, 61st Congress, Third Session, page 2072), includes the following:

> "The bill now reported forbids the railroads from using locomotive engines propelled by steam power *in moving interstate or foreign traffic,* unless the boilers and appurtenances thereof are in proper condition and safe to operate, and unless such boilers shall be inspected from time to time in accordance with the provisions of the Act." (Italics ours).

The courts have consistently held that when a locomotive is withdrawn from service for repairs and is no

longer being used in moving commerce the Boiler Inspection Act does not apply and this Court has repeatedly denied certiorari in such cases. *Lyle* v. *Atchison, T. & S. F. Ry. Co.*, 177 F.2d 221, cert. den. 339 U.S. 913, 70 S. Ct. 574; *Tisneros* v. *Chicago & N. W. Ry. Co.*, 197 F.2d 466, cert. den. 344 U.S. 885, 73 S. Ct. 184; *Flack* v. *Atchison, T. & S. F. Ry. Co.*, 285 Mo. 28, 224 S.W. 415, cert. den. 256 U.S. 690, 41 S. Ct. 449; *New York C. & St. L. Ry. Co.* v. *Kelly*, 70 F.2d 548, cert. den. 293 U.S. 595, 55 S. Ct. 110; *Sherry* v. *Baltimore & O. Ry. Co.*, 30 F. 2d 487, cert. den. 280 U.S. 555, 50 S. Ct. 16.

In the *Lyle* case, it was held that where a locomotive had ended its run and was at a roundhouse for servicing, it was not then being "used" within the Boiler Inspection Act, so as to protect an employee, who was injured while descending from the tender where he had gone to get a forgotten bucket after servicing such locomotive. The Court said, 177 F.2d l.c. 222:

> "Liability under the Act in question, like that under the Safety Appliance Act, 45 U.S.C.A., § 1, *et seq.*, depends not upon negligence but is an absolute one to obey the statutory requirements. For this reason Congress, obviously, in framing each of the Acts, in consideration of the unconditional duty to have cars and locomotives in such condition as not to put in peril life or limb while in use imposed upon the carrier, likewise limited the absolute liability to cars and locomotives while in use 'on the line'. In other words, when a locomotive or car is in 'use on the line', the mandatory duty of the carrier attaches and when the car or engine is not so in use then the duty under the express provisions of the statute does not exist."

This Court denied certiorari.

In the *Tisneros* case plaintiff was injured when he fell due to an icy condition on the steps of a locomotive which

had been withdrawn from service and was at the roundhouse. The Court approved and followed the Lyle case and this Court denied certiorari.

In the *Flack* case the Supreme Court of Missouri held the Boiler Inspection Act did not apply where the locomotive was not in "active service" but had been removed from service and was at a roundhouse. After pointing out the locomotive was not being used in moving traffic, the Court said that the Boiler Inspection Act did not apply because the locomotive had been taken out of service in order that work could be done "to avoid a violation of the provisions of the act whose penalties respondent now invokes." (224 S.W. l.c. 423). This Court denied certiorari.

The *Kelly* case involved a car instead of locomotive. The car had been removed to a place for repairs. The Court of Appeals of the 7th Circuit said: "Since it is clear that the car was not in use, it was erroneous to submit the case to the jury". This Court denied certiorari.

In the *Sherry* case a car had been placed on a side track for repairs and was not being used. The Circuit Court of Appeals of the 6th Circuit said: "The defectively equipped car not having been in use within the meaning of the Safety Appliance Act, at the time of the injury to plaintiff, the verdict was properly directed for the defendant." This Court denied certiorari.

Under the above decisions on which this Court denied certiorari in each case, it is clear that defendant's locomotive was not in use and in service at the time of plaintiff's accident but that it had been withdrawn from service and was on Union Pacific tracks for repairs not completed at the time of plaintiff's accident.

The Boiler Inspection Act is one of the Safety Appliance Acts. The petitioner has cited cases involving cars

rather than locomotives over-looking the fact that liability under the Boiler Inspection Act ceases to exist when a locomotive is taken out of service while liability as to cars (governed by other provisions of the Safety Appliance Acts) applies while a car is being moved to the place of repair after it is withdrawn from service. The Safety Appliance Acts do not include the provision found in the Boiler Inspection Act that the equipment be "in the active service" of the railroad and "in the service to which the same are put." In fact, the provisions of the Safety Appliance Acts specifically include a provision to make the civil liabilities applicable to a car withdrawn from service while being moved to the place of repair. Section 4 of the Act (45 U.S.C.A. 13) includes the following provision not found in the Boiler Inspection Act:

> "Provided, That where any car shall have been properly equipped, as provided in sections 1-16 of this title, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by this section or section 6 of this title, if such movement is necessary to make such repairs and such repairs cannot be made except at such repair point; and such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of sections 1-16 of this title; * * *."

Regardless of the above provision, the decisions applying the Safety Appliance Acts hold that when a car has reached the place of repair on repair tracks of the defendant, the Acts are not applicable and this is true in cases where the injured person was engaged in an inspection preliminary to repairs as in the instant case. *Sherry* v. *Baltimore & Ohio R. Co.*, 30 F.2d 487 (C.C.A. 6), cert. den. 280 U.S. 555, 50 S. Ct. 16; *New York C. & St. L. R. Co.* v. *Kelly*, 70 F.2d 548 (C.C.A. 7), cert. den. 293 U.S. 595, 55 S. Ct. 110.

Even if this case involved a car instead of a locomotive, there would be no liability under the Safety Appliance Acts because the locomotive had reached the place of repair. The only decision of this Court involving facts in any way comparable cited by petitioner is *Brady* v. *Terminal R. Ass'n of St. Louis*, 303 U.S. 10, 58 S.Ct. 426, 82 L. Ed. 614. In the Brady case, the plaintiff Brady was employed by the Wabash as a car inspector. The Terminal Railroad Association had placed a line of fifty cars on a transfer or interchange track at Granite City, Illinois. While inspecting these cars plaintiff fell because of a defect in one car. He sued the Wabash and the Missouri Supreme Court held that the Wabash was not liable because the car at the time of plaintiff's injury was not in service on the Wabash's line. An attempt was made to have the Supreme Court of the United States reverse this opinion, but the Supreme Court denied certiorari. 287 U.S. 538, 77 L. Ed. 538. While the case was pending against the Wabash, plaintiff sued the Terminal Railroad Association. The Supreme Court of Missouri held in *Brady* v. *Terminal Railroad Ass'n*, 102 S.W. 2d 903, 340 Mo. 841, that plaintiff could not recover against the Terminal but this opinion was reversed by the Supreme Court of the United States. This Court held that while the Wabash was not liable, the Terminal was liable

because the car was still in the possession of the Terminal, had not been withdrawn from service for repairs, but was being held on a receiving track temporarily pending continuance of transportation. This Court held that the use of the car which proved defective had not ended when the plaintiff was injured but that the car in question had been placed on a receiving track "temporarily pending the continuance of transportation." The Court distinguished the case from other decisions on the basis that the car had not been withdrawn from use and that the case was not a case where a defective car had reached a place of repair. The Court said, 303 U.S. l.c. 13:

> "The 'use, movement or hauling of the defective car', within the meaning of the statute, had not ended when petitioner sustained his injuries. *Chicago, G. W. R. Co.* v. *Schendel*, 267 U.S. 287, 291, 292, 69 L. Ed. 614, 617, 45 S. Ct. 303. The car had been brought into the yard at Granite City and placed on a receiving track temporarily pending the continuance of transportation. If not found to be defective, it would proceed to destination; if found defective, it would be subject to removal for repairs. It is not a case where a defective car has reached a place of repair. See *Baltimore & O. R. Co.* v. *Hooven*, (C.C.A. 6th) 297 Fed. 919, 921, 923; *New York C. & St. L. R. Co.* v. *Kelly*, (C.C.A. 7th) 70 F.2d 548, 551. The car in this instance had not been withdrawn from use. *Johnson* v. *Southern P. Co.*, 196 U.S. 1, 21, 22, 49 L. Ed. 363, 371, 25 S. Ct. 158; *Delk* v. *St. L. & S. F. R. Co.*, 220 U.S. 580, 584-586, 55 L.Ed. 590, 594, 595, 31 S. Ct. 617; *Great Northern R. Co.* v. *Otis*, 239 U.S. 349, 351, 60 L.Ed. 322, 323, 36 S. Ct. 124; *Chicago, G. W. R. Co.* v. *Schendel*, 267 U.S. 287, 69 L. Ed. 614, 45 S. Ct. 303, *supra*."

The Court then pointed out that under specific provisions of the Safety Appliance Acts some of its provisions apply to a car removed from service while being hauled to the repair point. It was said, 303 U.S. l.c. 15:

"Even where the required equipment is known to have become defective and the car is being hauled to the nearest available point for repairs, while the Act relieves the carrier in such a case from the prescribed penalties, the carrier still remains subject by the express terms of the statute to civil liability for injuries sustained by 'any railroad employee' in the course of such a movement by reason of the defective equipment. Act of April 14, 1910, chap. 160, § 4, 36 Stat. at L. 299 (45 U.S.C.A., § 13). See *New York, C. & St. L. R. Co.* v. *Kelly*, (C.C.A. 7th) 70 F.2d 548, *supra*."

Accordingly, the Brady case holds that those engaged in the inspection of cars to determine whether their use in service should continue or whether they should be withdrawn from service because of defects that may exist, are protected by the Safety Appliance Acts and that lines of cars and trains while being subjected to such inspection, pending the continuance of transportation, are still in service and in use. The Court recognized that the Act would not be applicable if the car had reached the place of repair.

In *Compton* v. *Southern Pacific Co.*, 161 P. 2d 40, 70 Cal.App. 2d 267, plaintiff was injured while working on a locomotive that was leaking steam because of a defective check valve on the boiler. At the time of the accident, the locomotive was undergoing running repairs at the defendant's roundhouse. The repairs that were being made were of a minor nature. If more extensive repairs had been required, the locomotive would have been placed "in the hole", and would have been marked "out of service". The Court reviewed the *Kelly, Sherry*, and other cases, pointing out that these were cases involving the Safety Appliance Acts. It held that even under those cases there could be no recovery because the locomotive had reached the place of repair, but the Court held that the special language con-

tained in the Boiler Inspection Act distinguished it from other Acts. After referring to the provisions of the Boiler Inspection Act and the different language in the Safety Appliance Act, the Court said, l.c. 45:

> "This language is obviously different from that used in the Boiler Inspection Act which makes it unlawful 'for any carrier to use or permit to be used on its line' any locomotive unless the boiler is safe 'to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb.' 45 U.S.C.A., § 23. This last language was carefully framed to state the thought that the absolute liability being imposed only applied while the locomotive was in actual use on the 'line' of the company in 'active service.'"

The Court in the Compton case discussed the Brady case, pointing out that in the Brady case the car had not been withdrawn from service or moved to a place of repair and that the holding in the Brady case supported the California Court's opinion.

Similarly, in *Atlantic Coast Line R. Co.* v. *Edge*, 81 Ga. App. 606, 59 S.E. 2d 533, a car had been withdrawn from use in order that certain repairs could be made to a running board. In holding that the Safety Appliance Act did not apply, the Court followed the *Lyle* case and with respect to the *Brady* case said, 59 S.E. 2d l.c. 536:

> "The alleged facts in the present case are distinguishable from a situation where a car had not actually been withdrawn from use, but was being inspected to determine whether or not its use should be stopped. See Brady v. Terminal R. Ass'n, 303 U.S. 10, 11, 13, 58 S.Ct. 426, 82 L.Ed. 614, 617."

Petitioner argues that the locomotive was in use on defendant's "line" even though it is conceded that the locomotive was, at the time, on Union Pacific tracks immediately

outside its roundhouse for repairs. Petitioner relies upon a number of cases discussed on pages 9 to 14 of his petition. These cases furnish no support for petitioner's conclusion. In each of the cases the defendant railroads were using lines of other railroads in switching and moving cars and trains. These cases hold that when a railroad arranges with another to use its line for moving its cars and trains, such line becomes the line of the defendant insofar as the Safety Appliance Acts are concerned. Thus, in *United States* v. *New York Central R. Co.*, the defendant railroad was hauling a defective car in a freight train over a connecting carrier's line. The Court held l.c. 763:

> "That the Central was '* * * using, hauling * * *' the defective car on the occasion seems obvious. It became a part of the train at the instance of Central directions. It was moved by Central equipment, manned by Central employees. Its movement was an obligation of the Central to the shippers. Was it being used or hauled upon '* * * its line * * *' as these words are used in the statute? The case of *Philadelphia & Reading Ry. Co.* v. *United States*, 3 Cir., 191 Fed. 1, seems to be the only cited authority in point. It holds in substance that an actionable violation of the Act occurs when an interstate railroad carrier hauls a defective car in its own train, in the control of its own employees, over a line upon which it had a legal right to conduct its interstate traffic."

And in the *Gray* case, 197 Fed. 874, the Court said, l.c. 875:

> "In the recent case of *Philadelphia R. Co.* v. *United States*, 191 Fed. 1, 111 C.C.A. 661, it was held by the Circuit Court of Appeals for the Third Circuit that where a railroad company operated its trains engaged in interstate commerce with its own engines and crews over the tracks of another company under a contract between them, such other tracks are a part of its line within the meaning of the Safety Appliance Act and

its amendments so as to require cars operated upon them to be equipped with safety appliances as therein required. The doctrine of this case, in my opinion, is controlling in the case at bar."

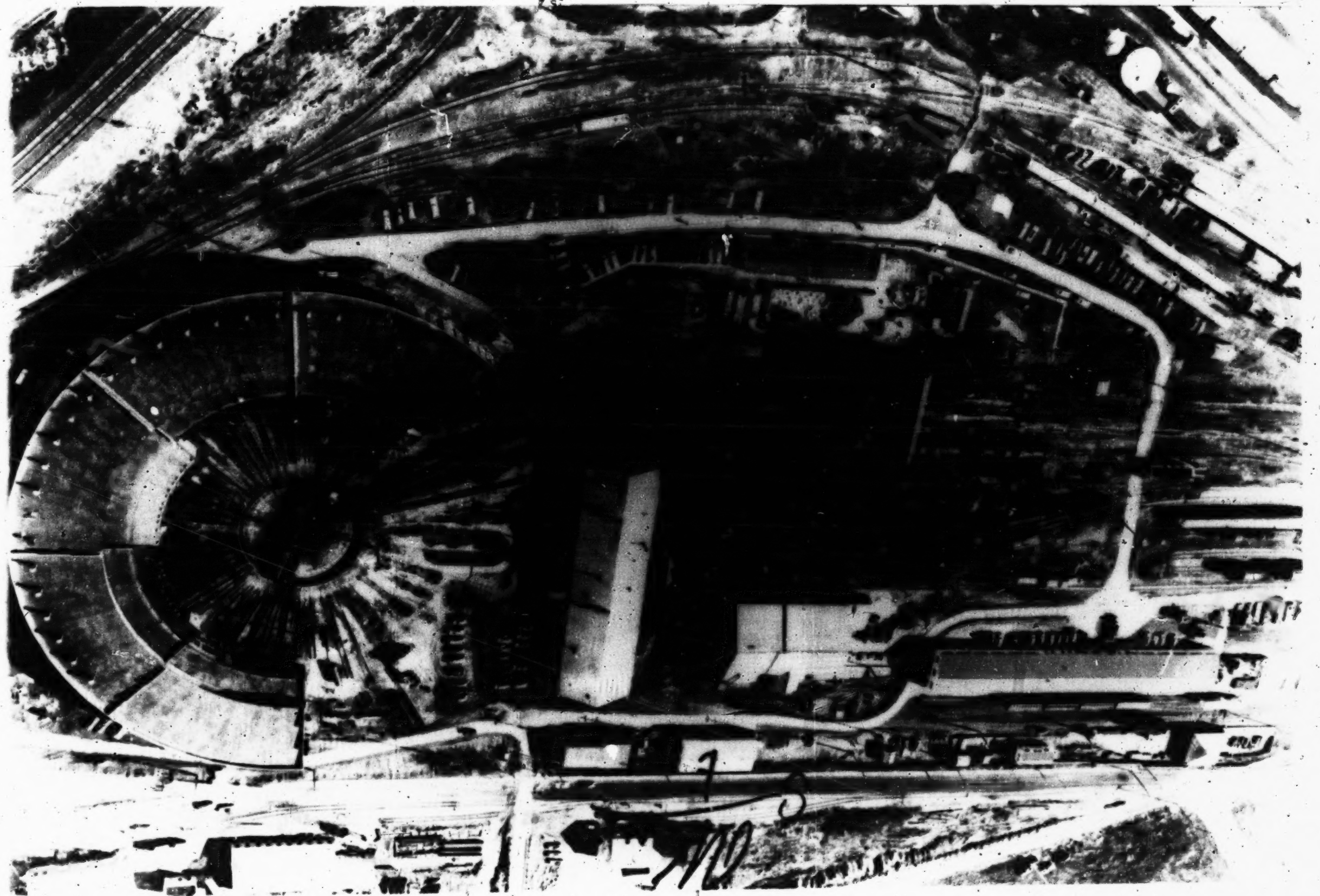
In each of these cases, the arrangement was that the defendant railroad could use the tracks of another railroad for the movement and handling of its cars in interstate traffic. And, in each case, the defective car was being used for such purpose. It seems clear that such cases are no authority for holding that defendant's locomotive was in "use" and "in active service" on its line since the arrangement here was that the tracks of the Union Pacific were to be used only as repair tracks and for reaching the place of repair and not for the movement of cars or locomotives in handling traffic.

CONCLUSION.

The foregoing discussion shows clearly that the petitioner has no sound basis either under the facts or the law for claiming that the trial court erred in holding that plaintiff did not make a case under the Boiler Inspection Act. The facts and the decisions show that petitioner's contentions are unsound particularly in light of the important and controlling facts not mentioned by petitioner. Regardless of such matters, however, the petition should be denied because petitioner is seeking to obtain certiorari on a question which the Supreme Court of Missouri found unnecessary to decide because petitioner did not preserve the point for review on appeal.

Respectfully submitted,

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SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 171.

J. A. SIMPSON,
Petitioner,

vs.

THE KANSAS CITY CONNECTING RAILWAY COMPANY, a Corporation,
Respondent.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

Respondent has attempted to impugn our statement of facts with the charge of inaccurate and misleading statements of fact (Resp. Br. pp. 1, 2). We cannot, in fairness to this Court and our client permit such charges to go unanswered.

The first such charge is against our statement on page 8 of Petitioner's Statement of the Facts that "plaintiff backed the engine up to the place for delivery to the Union Pacific for repairs" (Resp. Br. pp. 1, 2). In answer we

quote the transcript of the record on appeal in the Supreme Court of Missouri, as follows (Tr. pp. 83-84):

"By Mr. Mattes:

Q. Mr. Simpson, you were interrogated, asked, yesterday by Mr. Ewing, here, with regard to backing the engine up from the oil house to a point in front of the engine dispatcher's office?

A. Yes, sir.

Q. He didn't inquire and I have forgotten to ask you whether you had ever done that before?

A. It had been done every time any time the engine was found defective.

Mr. Ewing: I am objecting to this for two reasons: That it is repetitious, and there is no showing—it is not responsive to the question. He said something that other people did.

The Court: I think it is repetitious, but I will permit him to answer it.

Q. Had you ever done that before?

A. No, I hadn't.

Q. Had you ever been in the crew when it was done before?

A. Yes, sir.

Q. How frequently and over what period of years?

A. Oh, I would say five or six times every year.

Q. And over what period?

A. Every time since I have been going there, twenty years.

Q. When you were with your engineer when this engine had been backed up on those occasions that you have told us about, what occurred?

A. He made the inspection of the engine, and when he did that he turned it in to the dispatcher's office, signed the book, signed the engineer's register.

Mr. Mattes: That is all.

Mr. Ewing: No further questions."

There had been some confusion in the testimony of plaintiff previously but he was put back on the stand and gave the above testimony clearing up such confusion and making it certain that the place where the engine was left on the occasion in question was the usual place for delivery to the Union Pacific for repairs. Respondent selects testimony of plaintiff as conclusive and uncontradicted which plaintiff later repudiated and cleared up when he was recalled to the stand. It is clear that plaintiff was entitled to the more favorable testimony set forth above with all reasonable inferences deducible therefrom and the Respondent may not thus rob him of the benefit thereof and thus deprive him of federal rights under F.E.L.A., *Lavender* v. *Kurn*, 327 U.S. 653, 66 S.Ct. 740, 744, 90 L.Ed. 916; *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U.S. 29, 35, 64 S.Ct. 409, 412, 88 L.Ed. 520.

Respondent next claims that in moving the engine from the place near the oil house to a spot near the dispatcher's office plaintiff was doing the work normally done by the Union Pacific hostlers (Resp. Br. p. 2). We quote plaintiff's testimony on cross-examination on that question (Tr. 45, 46):

"Q. Why didn't you have a hostler—

A. (interrupting) That had been the custom, just like I had done it for twenty years.

* * *

Q. Well, now, the Union Pacific hostler could have moved it from the oil house back there, couldn't he?

A. Yes, he could, but he didn't.

Q. As a matter of fact, you were just doing their work when you did it?

A. Maybe so, but it didn't make any difference, it had been done that way before.

Q. But that is what they were supposed to do to back the thing up there from the oil house?

A. I don't know what they were supposed to do; I am not acquainted with the duties of the U. P. hostlers.

Q. What were the duties of the Union Pacific hostlers?

A. I don't know; I am not acquainted with their rules."

Being interrogated as to who moves the things left at the oil house down to the roundhouse plaintiff testified (l.c. 48):

"Q. Who else besides them does that?

A. It could be hostlers, as I said before; it could have been them.

Q. Regardless of what you want to call them, in any event when you moved that engine beyond the oil house you were doing the work of the president or vice-president of the Union Pacific, or of the hostlers?

A. I just told you that had been the custom ever since I had been there."

We submit respondent's statement that in moving the engine down near the engine dispatcher's office he was doing the work of Union Pacific hostlers is not justified when plaintiff's testimony (and there was no other) was that it had been the custom for the 20 years since he had been there for Respondent's engineer to move its engines down by the engine dispatcher's office near the roundhouse (Tr. 10, 48).

It is further asserted that our statement on page 9 of Petitioner's Statement that at the time of plaintiff's injury the engine was not at the place where repairs were to be made is inaccurate and misleading (Resp. Br. p. 2). Again we quote plaintiff's testimony from the record (Tr. 10, 54, 45):

"Q. You are the plaintiff in this case?

A. I am.

Q. You are suing the railroad for an injury on the job which occurred when?

A. In 1950.

Q. What date in 1950?

A. December 26th.

* * *

Q. Would you describe for the Court and jury what kind of day it was?

A. Well, it was a cold day.

Q. Do you recollect how cold?

A. Oh, I would say maybe 19.

* * *

Q. In other words, you had taken it back down there according to your testimony so they could do some more repair work on it, is that right?

A. Well, they had some repair work to do on it, but they could not have done it outside."

That testimony makes it clear that the engine had to be moved to and into the roundhouse to be repaired. The manner of questioning of Respondent's counsel quoted above is based on the premise that the engine had to be moved into the roundhouse under the sheds and he was contending that was the work of the Union Pacific hostlers.

The record is not clear as to the exact distance the engine had to be moved to the place in the roundhouse where it would be repaired. The aerial photograph of the Union Pacific roundhouse (plaintiff's Exhibit No. 2 at the trial) is reproduced at the end of Respondent's Brief and clearly justifies some inferences. A large turntable is clearly seen in the center of the roundhouse. It is a reasonable assumption that the turntable is long enough to

accommodate the largest locomotive engine on the Union Pacific System. Using that as a measuring stick and noting the number of different railroad tracks arranged around it like spokes in a wheel it becomes readily apparent that this is a huge roundhouse which will accommodate many large locomotives at one time. It is also apparent that there is an outer semicircle of sheds where engines may be taken under cover to be worked on during cold winter weather like that on the day of the accident.

From the above it is readily inferable that the engine in question would be moved over the track it was on, to the turntable and by the turntable moved to a selected track and then moved over one of the tracks radiating out from the turntable into one of the sheds where it would be repaired. The movement of this engine, required to put it in a shed for repairs in this winter weather, is not infinitesimal as Respondent would have the Court believe but was a substantial movement fully justifying our description 'that it was not at the place where repairs were to be made" (Resp. Br. p. 2). We submit Respondent is the party guilty of an inaccuracy when it states the engine at the time of plaintiff's accident "had reached the place of repair" (Resp. Br. p. 7).

In the case of *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U.S. 29, 35-36, 64 S.Ct. 409, in an F.E.L.A. case the Court said:

> "(6-8) It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs

the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Washington & Georgetown R. Co. v. McDade, 135 U.S. 554, 571, 572, 10 S.Ct. 1044, 1049, 34 L.Ed. 235; Tiller v. Atlantic Coast Line R. Co., supra, 318 U.S. 68, 63 S.Ct. 451, 143 A.L.R. 967; Bailey v. Central Vermont Ry., 319 U.S. 350, 353, 354, 63 S.Ct. 1062, 1064, 87 L.Ed. 1444. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

"(9) Upon an examination of the record we cannot say that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. Thus to enter a judgment for respondent notwithstanding the verdict is to deprive petitioner of the right to a jury trial. No reason is apparent why we should abdicate our duty to protect and guard that right in this case. We accordingly reverse the judgment of the court below and remand the case to it for further proceedings not inconsistent with this opinion."

The ruling in the present case is in conflict with the Tennant case and deprives petitioner of a jury trial in violation of the rule of law in the Tennant case.

CONCLUSION.

For all the reasons set forth above and in Petitioner's Petition for Certiorari and supporting suggestions filed herein we respectfully ask that a Writ of Certiorari issue to the Supreme Court of Missouri herein and that appropriate relief be granted petitioner adequate to guarantee his rights under the Boiler Inspection Act, as prayed in the Petition for Certiorari herein.

Respectfully submitted,

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